



TCF Submission to
Department of the Prime Minister and Cabinet and Ministry of Justice
New Zealand Accession to the Budapest Convention on Cybercrime
11 September 2020

A. Introduction

1. The New Zealand Telecommunications Forum (known as the TCF) welcomes the opportunity to provide a submission to the Ministry of Justice in relation to the consultation paper regarding New Zealand's accession to the Budapest Convention (the Paper).
2. The TCF is New Zealand's 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. The TCF facilitates the development of consensus-based, self-regulatory codes that set standards and specifications for members delivering telecommunication services within New Zealand. TCF members represent 95 percent of New Zealand telecommunications customers: 2degrees, AWACS, Chorus, Enable Networks, Northpower Fibre, NOW, Spark, Symbio, Trustpower, Ultrafast Fibre, Unison Fibre, Vector, Vocus and Vodafone.
3. The TCF supports the aims of the Budapest Convention and understand the benefits it could bring to New Zealanders in the fight against crime and cyber-crime. The TCF is acutely aware of the increasing number of scams and cyber based crime affecting New Zealand telecommunications customers.

4. New Zealand's accession to the Budapest Convention is of particular interest to the TCF. The primary impact on TCF members will relate to the establishment of the data preservation scheme to meet the legal obligations that will be imposed on New Zealand.
5. This submission focusses on the key concerns regarding the legislation and legal obligations that will be imposed on New Zealand telecommunication companies to ensure that the New Zealand Government meets its obligations under the Budapest Convention.
6. As set out in the consultation paper, we understand that a further consultation with the telecommunications sector is also expected to take place, aimed at verifying assumptions and cost estimates associated with the data preservation scheme.

B. Specific areas of support

7. The TCF is encouraged that the Government has taken account of earlier submissions from the telecommunications sector. In particular the TCF supports that:
 - i. service providers will not be required to keep any new types of data (appendix B paras 11, 12, 17);
 - ii. service providers will have an ability to appeal/resolve unreasonably onerous or resource-intensive requests;
 - iii. service providers will not be required to provide data in a specific formatting;
 - iv. service providers will have to work only with local agencies rather than directly with international agencies;
 - v. the scheme will not allow for prospective preservation; and
 - vi. there will be a standard time period for preservation orders to be 180 days for international, and 30 days for domestic orders. Clear timeframes make it simpler to administer than a range of different durations.

C. Financial Implications:

8. The TCF notes under cl.55, the Paper references consultation with telecommunications companies on the potential costs and practicalities of developing a data preservation scheme. The TCF continues to raise concerns about cost recovery and does not consider that the draft proposal adequately deals with the following issues:
 - 8.1. The current environment is voluntary and relies on telecommunications companies providing their resources on a best effort basis. This baseline should not be the starting point for a mandatory data preservation scheme, companies must have the ability to recover their costs.

- 8.2. The TCF would support a cost recovery scheme that appropriately provides incentives for all parties, including law enforcement, to avoid service providers being swamped with requests.
- 8.3. The cost recovery scheme should be built into the legislation. Even if it is not initially implemented it is a necessary safeguard if costs relating to the data preservation scheme get out of control. We see three ways this could happen:
 - 8.3.1. Domestic agencies use the scheme more than expected (refer to 7.3 on domestic use);
 - 8.3.2. The type of mutual jurisdiction case considered is likely on the rise and therefore likely to increase numbers beyond the assumed annual 10 – 15 preservation orders;
 - 8.3.3. Some mutual jurisdiction cases can be very resource intensive and a significant burden to assist, e.g. Kim Dotcom.
- 8.4. The Paper states that the process of issuing a preservation order will be aligned with those for issuing a production order and it is expected that preservation orders are unlikely to be applied for by domestic agencies due to the speed a local production order can be obtained (cl.58). To help ensure that the appropriate use of preservation orders and to mitigate the risk that they could be misused (cl.57) the scheme should only be available to overseas agencies signatories to the Budapest Convention and not domestic agencies.
- 8.5. It is not clear how the Paper concludes that a preservation order is estimated at an average of \$1000 per order. TCF members have indicated from their own analysis that the cost is likely to exceed \$1000, on average.
- 8.6. When the interception capabilities were introduced the Crown supported the industry with funding for the up-front capital costs¹. This same approach must be followed again. The proposed preservation regime is potentially a significant expansion of the requirements on telecommunications providers, and will likely require significant upgrades of systems to support.
- 8.7. Any cost recovery regime pricing structure also needs to take account the length of time that storage of data will be required as preservation orders will be extendable indefinitely.
9. Thus, the TCF view is that any proposed legislative changes should ensure a robust cost recovery scheme. The TCF reiterates the importance of further consultation with the telecommunications sector and relevant agencies to test the assumptions made in the

¹reference is to sections 15 and 16 of the Telecommunications (Interception Capability) Act 2004

Paper on the financial implications (cl.56 – 61) of the proposed data preservation scheme outlined in Appendix B.

D. Appendix B: Proposed Data Preservation Scheme

10. The scope of the data preservation scheme should be confined to the minimum requirements necessary to accede to the Budapest Convention, that is:
 - 10.1. It should apply only to cybercrimes covered in Articles 2 through 10 of the Budapest Convention.
 - 10.2. The ability to delegate authority (cl.15) for a preservation order should be removed. If, as the Ministry for Justice infers there will only be approximately 15 cases a year, it is not onerous to require CEOs to authorise this level of orders.
 - 10.3. The TCF disagrees with the concept of ‘verbal orders’ (cl.18). If an international law enforcement agency has justifiable cause to request a preservation order then the administrative paperwork is only a small additional step and avoids the risks of a two-step process of responding to verbal orders and later processing the paperwork, which may differ in a material way.
 - 10.4. We are concerned that the current proposal appears to allow for preservation orders to be extendable indefinitely for the same period as the original duration (cl.22). In our view this creates an undesirable level of uncertainty around preservation orders which could potentially greatly increase the amount of manual inputs required to comply, and the associated costs. For these reasons we recommend a cap on the number of potential extensions to be included in the regime, so that operators can be certain of a maximum period of time that data must be preserved for.
 - 10.5. The data preservation scheme should be clear if a preservation order is issued to a person or entity they cannot be penalised for the actions of third parties that result in the loss of specified computer data stored electronically in the cloud (cl.26). Cloud storage may mean multiple parties have some measure of control over data subject to a preservation order.
11. Finally, the Department of the Prime Minister and Cabinet and Ministry of Justice will need to work with the Privacy Commissioner to ensure the provisions of the Budapest Convention are enacted appropriately with respect to New Zealand’s privacy framework.
12. The TCF is happy to answer any questions regarding the information provided and the views set out in this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G. Thorn', followed by a horizontal line extending to the right.

Geoff Thorn
Chief Executive Officer
New Zealand Telecommunications Forum (TCF)