

Budapest Convention and Related Matters Legislation Amendment Bill

Government Bill

Explanatory note

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 co-operation on cross-border investigations and prosecutions by providing a consistent framework for defining computer crimes, enabling lawful access to evidence, and outlining expectations about how relevant international agencies assist each other. The Convention requires provisions giving effect to it 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 co-operation 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 1 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 that 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 that 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 out of New Zealand, 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 the production of a national interest analysis.

Departmental disclosure statement

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2024&no=81>

National interest analysis

A national interest analysis for the Budapest Convention was produced that takes the place of a regulatory impact analysis. In accordance with Standing Order 405(2), the national interest analysis was presented to the House of Representatives at the same time as the Budapest Convention on 26 May 2021.

A copy of that national interest analysis can be found at <https://selectcommittees.parliament.nz/v/15/8e18c607-e26c-4009-a4b8-8956a4ea15b6>.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. If the Bill is enacted, most of the Act will come into force on a date or dates set by the Governor-General by Order in Council or on 1 October 2025 (if not brought into force earlier by Order in Council).

Commencing most of the Bill by Order in Council and no later than 1 October 2025 will enable necessary administrative arrangements to be made and co-ordinate commencement with the date on which the Council of Europe Convention on Cybercrime (the **Budapest Convention**) comes into force for New Zealand. The Budapest Convention will come into force for New Zealand on the first day of the month that follows the 3-month period after the related instrument of accession is deposited with the Council of Europe (Article 37 of the Convention). The instrument of accession is expected to be deposited in June 2025, which would mean that the Budapest Convention would come into force on 1 October 2025.

The following amendments will come into force on the day after Royal assent:

- amendments to the Crimes Act 1961 (*Part 2*);
- amendments to the Search and Surveillance Act 2012 that are made by *clauses 10 and 20* and are related to an amendment to the Crimes Act 1961 that is made by *Part 2*;
- amendments to the Search and Surveillance Act 2012 that are made by *clauses 5 and 23 to 26*, mainly providing for—
 - certain transitional, savings, and related provisions (including a savings provision related to the amendment made by *clause 10*); and

- renumbering of the Schedule of that Act as a consequence of *clause 24* (which inserts a schedule of transitional, savings, and related provisions into that Act).

Part 1

Amendments relating to investigatory tools

Subpart 1—Amendments to Search and Surveillance Act 2012

Interpretation and general

Clause 3 provides for *subpart 1* to amend the Search and Surveillance Act 2012 (the **principal Act**).

Clause 4 inserts definitions into the interpretation section as a consequence of other amendments made by the Bill.

The term traffic data is defined as having the same meaning as in *new section 3AB* of the Telecommunications (Interception Capability and Security) Act 2013. The new section is inserted into that Act by *clause 47* and aligns with the definition of that term in Article 1 of the Budapest Convention.

Clause 5 inserts *new section 3A*. *New section 3A(1)* provides for transitional, savings, and related provisions to be set out in *new Schedule 1*. *New section 3A(2)* inserts a signpost to existing transitional provisions relating to the principal Act.

Clauses 6, 9, and 15 replace the similarly worded sections 42, 58, and 77. Those sections ensure that 2 sections of the principal Act that apply to search warrants also apply to examination orders, surveillance device warrants, and production orders. *New sections 42, 58, and 77* generally recreate the effect of the replaced sections, but clarify how section 107 (when a search warrant is invalid) is to be applied to those orders and warrants (*see new sections 42(2), 58(2), and 77(2)*, in particular). *New sections 79M and 88R* (which are inserted by *clauses 18 and 19* and relate to when preservation directions are invalid) generally have an effect that aligns with *new sections 42(2), 58(2), and 77(2)* and section 107.

Clauses 7 and 8(1) insert signposts to a relevant section to assist understanding.

Clause 8(2) amends section 55 as a consequence of amendments made by—

- *clause 4* and *subpart 3* (new definitions of network operator and traffic data); and
- *clauses 11 and 14* (*see the analysis of clauses 11 and 14* below).

Clause 10 inserts *new section 64A*, which requires a person who obtains, makes, or generates a record of information, as a consequence of assisting an enforcement officer to whom a surveillance device warrant is directed, to either destroy that record or ensure that it is given to the law enforcement agency concerned as soon as is reasonably practicable after the warrant expires.

The new section generally recreates the effect of section 216B(7) of the Crimes Act 1961, which is repealed by *clause 55* (in *Part 2*) and is more appropriately located in the principal Act. It generally supports section 179 of that Act (offence to disclose information acquired through search or surveillance). Section 179 aligns with Articles 20(3) and 21(3) of the Budapest Convention to the extent that the section relates to a surveillance device warrant that authorises an interception device to be used to intercept or record a telecommunication.

Production orders

Clauses 11 to 17 amend subpart 2 of Part 3. That subpart is about applying for, and the making and effect of, production orders.

Clause 11 replaces section 70, which is the interpretation section for subpart 2 of Part 3. *New section 70* defines document for the purposes of the subpart as including—

- computer data; and
- a computer program; and
- a record of traffic data; and
- a record of the content of a telecommunication.

The main effect of a production order is to require the person against whom it is made to give documents described in the order that they possess or control to an enforcement officer. Including computer data and a computer program in the definition of document ensures consistency with Article 18 of the Budapest Convention, which relates to production orders.

The effect of the definition of document in the existing section 70 is recreated by *new section 75A*, which is inserted by *clause 14* (see the analysis of *clause 14* below). Including a record of traffic data and a record of the content of a telecommunication in the definition of document in *new section 70* is related to *new section 75A*.

Clause 12 makes amendments that clarify particulars that must be set out in an application for a production order by ensuring that they align with a condition of making a production order that is set out in section 72(b)(ii).

Clause 13 amends section 75, mainly as a consequence of an amendment made by *clause 12*.

Clause 14 inserts *new section 75A*, which provides that a production order may require a network operator to produce a record of traffic data or of the content of telecommunications, only to the extent that the network operator stores that traffic data or content in the ordinary course of its business.

Clause 15 replaces section 77 with *new section 77* to clarify how section 107 (when a search warrant is invalid) extends to production orders. The new provision also generally aligns with the effect of *new sections 42, 58, 79M, and 88R* (inserted by *clauses 6, 9, 18, and 19*) and section 107.

Clause 16 amends section 78 to extend certain powers of the enforcement officer who applied for a production order (for example, to retain and copy produced documents)

to other enforcement officers employed or engaged by the same law enforcement agency as the applicant. *Clause 17* makes a consequential amendment.

Preservation directions: overview

Clauses 18 and 19 insert *new subpart 2A of Part 3* and *new Part 3A* (respectively), which are about applying for, making, and the effect of preservation directions. To the extent that the new subpart and Part are concerned with ensuring that computer data and computer programs are preserved and that records of pathway information (as defined in *new section 79A*) are produced to enforcement officers, the new subpart and Part align with Articles 16, 17, 29, and 30 of the Budapest Convention.

The new subpart applies in connection with investigations in New Zealand into offences against the law of New Zealand. The new Part applies in connection with investigations or criminal proceedings outside of New Zealand relating to an offence against the law of a foreign country.

The main effect of a preservation direction is to require a person who possesses or controls documents to preserve them, as an interim measure before an application for a production order in respect of those documents is made or determined under—

- the principal Act; or
- *new section 45* of the Mutual Assistance in Criminal Matters Act 1992, which is inserted by *subpart 2* (see the analysis of that new section, which is inserted by *clause 36*, below).

A preservation direction may also require the person, if they are a telecommunications service provider, to produce any record of pathway information that they possess or control. Pathway information is traffic data that identifies the path of a telecommunication (see *new section 79A*). Traffic data is certain information that is generated as a result of the making of a telecommunication (see *clause 4* and the analysis of *clause 47* below). The aim of requiring a telecommunications service provider to produce a record of pathway information is to enable enforcement officers to identify all telecommunications service providers in the chain of a telecommunication who might hold records of traffic data that are relevant to an investigation.

Preservation directions relating to New Zealand investigations (new subpart 2A of Part 3)

New subpart 2A of Part 3 is inserted by *clause 18* and contains *new sections 79A to 79Y*.

Many of the provisions in *new subpart 2A* are similar to those in subpart 2 of Part 3 (production orders), mainly because—

- a preservation direction is an interim measure before a related application for a production order is made under that subpart; and
- an application for a preservation direction is allowed to be made or issued only if a related application for a preservation order is about to be made or has been made but not yet determined.

Interpretation

New section 79A defines terms for the purposes of the new subpart.

The new section defines document as having the same meaning as in subpart 2 of Part 3 (which relates to production orders). See the explanation above of the definition of document in the analysis of *new section 70* (inserted by *clause 11*).

Applications for preservation directions

New section 79B allows an enforcement officer who is allowed to apply for a search warrant to obtain documents to apply to the Commissioner of Police (the **Commissioner**) for a preservation direction against a person in respect of those documents if satisfied that certain conditions are met. The requirement for the enforcement officer to be someone who is allowed to apply for a search warrant to obtain the documents is a requirement that an enforcement officer applying for a production order must also meet (*see section 71(1)*).

New section 79C provides for the form and content of an application for a preservation direction.

New section 79D enables the Commissioner to allow the application to be made orally.

Preservation directions: making, duration, and other matters

New section 79E sets out 5 conditions for making a preservation direction. The applicant may apply for a preservation direction and the issuing officer may make the direction only if satisfied that the 5 conditions are met (*new sections 79B and 79F*).

The first of those conditions is that the applicant (or another enforcement officer who may apply for a search warrant to obtain the documents that the applicant seeks to be preserved or produced)—

- is about to apply for a production order in respect of the documents that the applicant seeks to be preserved; or
- has applied for a production order in respect of those documents and an issuing officer has not yet granted or refused the application for the order.

The next 3 conditions are the same as or similar to the conditions for making a production order and are as follows:

- there are reasonable grounds to suspect that an offence has been, is being, or will be committed;
- that offence is an offence in respect of which the principal Act or another enactment listed in Schedule 2 (as renumbered by *clause 25(1)*) of the principal Act authorises an enforcement officer to apply for a search warrant;
- there are reasonable grounds to believe that the documents (including any record of pathway information that the applicant seeks to be produced)—
 - are evidential material in respect of the offence; and

- are particularly vulnerable to loss or modification; and
- are in the possession or under the control of the person against whom the direction is sought.

The fifth condition is that, if the applicant seeks to have any record of pathway information produced under the proposed direction,—

- the applicant's purpose in seeking to have the record produced is to facilitate tracing of all telecommunications service providers involved in transmitting the related telecommunication; and
- the applicant seeks to have only as much of the record produced as is necessary for that purpose.

New section 79G provides for the form and content of a preservation direction.

New section 79H generally corresponds to *new section 75A*, which is inserted by *clause 14* and relates to production orders (*see* the analysis relating to *clause 14* above). *New section 79H* provides that a preservation direction may require a network operator to preserve a record of traffic data, preserve a record of 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.

New section 79I provides for the duration of a preservation direction. Generally, the direction expires at the end of the period specified in the direction (not exceeding 20 days after the date on which the direction is made). However, if an application is made for a production order relating to the same person, documents, and investigation before the preservation direction expires, the direction continues in force until the application is determined and is then revoked.

The new section also generally provides that, if the application is refused, the Commissioner must notify the person, except if a production order is made. If a production order is made, in effect the documents must be preserved until the order is complied with by producing the documents.

Reviews

New sections 79J to 79M provide for a review of the Commissioner's decision to make a preservation direction. Key points about the scheme for reviews are as follows:

- an application for a review must generally be made by the person against whom the direction is made no later than 5 working days after the direction is given to the person and before it expires or is revoked (*new section 79J(3)*);
- the review of the Commissioner's decision may only be conducted by a delegate of the Commissioner and not by any person who made the original decision as a delegate of the Commissioner (this is the effect of *new section 79K(1) and (2)*):

- the review must be conducted on the papers and generally completed no later than 5 working days after the application for review is lodged (*new section 79K(3)*):
- the outcomes of a review are that the decision is affirmed or the direction is amended or revoked (*new section 79K(4)*).

New section 79L, among other things, requires the Commissioner to notify the applicant of the reviewer's decision.

Invalidity

New section 79M provides for circumstances in which a preservation direction is invalid. The circumstances are similar to the circumstances in which an examination order, a surveillance device warrant, a production order, or a search warrant is invalid. (See *new sections 42(2), 58(2), and 77(2)* (inserted by *clauses 6, 9, and 15*) and section 107.)

Retention, copying, etc, of produced record of pathway information

New section 79N provides that when a record of pathway information is produced under a preservation direction, the applicant for the direction, or another enforcement officer employed or engaged by the same law enforcement agency as the applicant, may—

- retain the original record produced if it is relevant to the investigation or proceedings; or
- take copies of the record; or
- if necessary, require the person producing the record under the direction—
 - to reproduce, in usable form, the pathway information that is in that record; or
 - to assist a nominee or delegate of the relevant chief executive of the law enforcement agency concerned to reproduce that record in usable form; or
- require the person producing the record to provide any related information (for example, the names of any telecommunications service providers involved in transmitting the telecommunication) that is necessary to understand the pathway information.

The new section is in similar terms to section 78 (as amended by *clause 16*), which applies in relation to documents produced under production orders.

Offences

New section 79O makes it an offence for a person to fail to comply with a preservation direction without reasonable excuse. A person who commits an offence against the new section is liable to imprisonment for a maximum term of 1 year (if they are an individual) or a maximum fine of \$40,000 (if they are a body corporate). The new

section is modelled on section 174, which provides for a similar offence in the case of a person who fails to comply with a production order.

Under *new section 79P*, a person commits an offence if the person applies for a preservation direction and the application contains any assertion or other statement that they know is false. A person who commits an offence against the new section is liable to imprisonment for a maximum term of 1 year. The new section is modelled on section 175, which provides for a similar offence in the case of an applicant for a warrant or an order, including a production order.

New section 79Q aligns with Article 16(3) of the Budapest Convention to the extent that the new section relates to a preservation direction requiring preservation of computer data or computer programs. The new section provides for 2 offences that apply to a person who is affected by a preservation direction (that is, a person against whom a preservation direction is made or any officer, employee, or agent of that person). First, it makes it an offence for the affected person to knowingly disclose that the direction has been made. Second, it makes it an offence for the affected person to knowingly disclose any information that is contained in a document to which the direction relates if—

- the person against whom the direction is made possesses or controls the document; and
- the affected person would not have been able to disclose the information if the preservation direction had not been made (for example, because the document would not have been preserved).

The second offence is aimed at ensuring that the affected person does not tip off a person that a preservation direction has been issued and that, therefore, an investigation is underway.

A person who commits an offence against the new section is liable to imprisonment for a maximum term of 1 year (if they are an individual) or a maximum fine of \$100,000 (if they are a body corporate).

The new section provides that it is not an offence for the affected person to make the disclosure concerned in certain circumstances. Examples of those circumstances are that the disclosure is to an enforcement officer for the purpose of complying with the direction or to a lawyer for the purpose of obtaining legal advice or making representations in relation to the order. Another example is that the disclosure is made after the chief executive of the law enforcement agency concerned has notified the person against whom the direction is made under *new section 79R*.

New section 79R requires the chief executive of the law enforcement agency to notify the person against whom the direction is made if—

- the law enforcement agency decides to discontinue any investigation into the suspected offence that is the subject of the application for the direction; or
- any criminal proceedings that the law enforcement agency expects to be commenced in relation to the suspected offence have been commenced; or

- the chief executive decides for any other reason to give notice under the new section in relation to the direction.

However, the chief executive is not required to give notice if satisfied on reasonable grounds that disclosure that the direction has been issued or of the information contained in the documents concerned—

- would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- would endanger the safety of any person; or
- would prejudice the supply of information to the law enforcement agency; or
- would prejudice any international relationships of the law enforcement agency; or
- would prejudice the security or defence of New Zealand.

Immunities

New section 79S(1) provides that the Commissioner is immune from civil liability for anything that the Commissioner does, or omits to do, in good faith in determining an application for a preservation direction. Under *new section 79S(2)*, a reviewer of the Commissioner's decision to make a preservation direction has a similar immunity from civil liability. *New section 79S(3)* provides that, if the Commissioner or reviewer is immune from civil liability under *new section 79S*, the Crown is immune from civil liability in respect of the Commissioner's or reviewer's conduct.

New section 79T(1) ensures that certain immunities from civil liability that apply in relation to acts done in good faith in obtaining or executing orders and warrants under the principal Act also apply to preservation directions.

New section 79T(2) mainly ensures that, if a person is immune from civil liability under *new section 79T(1)*, the Crown is immune from civil liability in tort in respect of the person's conduct.

Effect of court proceedings

New section 79U relates to the effect of court proceedings on the following:

- exercising powers or discharging duties under the new subpart dealing with preservation directions;
- using, for investigative purposes, evidential material that is obtained under a preservation direction.

Service of documents

New section 79V provides for service of preservation directions and for service of notices required to be given under the new subpart.

Retention of documents

New sections 79W and 79X require the New Zealand Police and applicants who are issued with preservation directions to retain certain documents until the dates specified in the new sections. In particular,—

- the New Zealand Police and applicants are required to retain certain documents connected with applications for those directions; and
- the New Zealand Police are required to retain any directions that are issued, and applications for review of decisions to issue preservation directions.

Annual reporting

New section 79Y requires the Commissioner to report annually on—

- reviews of decisions to issue preservation directions; and
- the expiry of preservation directions where a related application for a production order has not been made; and
- the revocation of preservation directions where a related application for a production order has been granted; and
- the revocation of preservation directions where a related application for a production order has been refused.

Preservation directions relating to foreign investigations or proceedings (new Part 3A)

New Part 3A, which is inserted by *clause 19*, contains 8 subparts.

Many of the provisions in the new Part are similar to the provisions of *new subpart 2A of Part 3* (described in the analysis above). The main points of difference are as follows:

- a constable must apply for a preservation direction under the new Part at the request of a foreign enforcement authority if certain conditions are met (*see* the analysis of *new section 88A* below);
- the Commissioner has only limited grounds on which the Commissioner may refuse to grant the application (*see* the analysis of *new section 88D* below);
- a preservation direction under the new Part is generally in force for an initial period of up to 150 days, in contrast to a preservation direction under *new subpart 2A of Part 3*, which is generally in force for a maximum period of 20 days (*see* the analysis of *new section 79I* above and the analysis of *new section 88G* below);
- a preservation direction under the new Part is renewable, in contrast to a preservation direction under *new subpart 2A of Part 3*, which cannot be renewed (*see* the analysis of *new subpart 5* below).

Interpretation (new subpart 1)

New section 88A is the interpretation provision for *new Part 3A*.

Applications for preservation directions (new subpart 2)

New section 88B requires a constable to apply to the Commissioner for a preservation direction against a person if a foreign enforcement authority requests the New Zealand Police for a preservation direction against the person and 3 conditions apply.

Broadly, the first condition is that an investigation or proceedings relating to a serious offence against the law of the foreign country concerned has or have commenced. *New section 88A(1)* defines a serious offence as being an offence that is punishable by a term of imprisonment of 2 years or more.

The second condition is that the documents that the foreign enforcement authority seeks to be preserved are relevant to the investigation or proceedings.

The third condition is that a related mutual assistance request is in progress. Broadly, a relevant mutual assistance request is a request to New Zealand under *new section 43* of the Mutual Assistance in Criminal Matters Act 1992 from a foreign country for assistance in obtaining the relevant documents under a production order under that Act against the person. (See the definition of related mutual assistance request in *new section 88A(1)* and *new section 88A(3)* for what it means for a related mutual assistance request to be in progress. See also the analysis of *new section 43* of the Mutual Assistance in Criminal Matters Act 1992, which is inserted by *clause 37*, below.)

New section 88C provides for the form and content of the application.

*Preservation directions: making, initial duration, and other matters
(new subpart 3)*

In line with Article 29(1) and (5) of the Budapest Convention, *new section 88D* requires the Commissioner to grant the application unless satisfied that at least 1 of 4 grounds for refusing to grant the application is met.

The first of those grounds is that a related mutual assistance request is not in progress. The 3 other grounds align with grounds set out in section 27(1)(a), (b), and (f) of the Mutual Assistance in Criminal Matters Act 1992 for refusing a foreign country's request for assistance under that Act.

Those 3 grounds are as follows:

- the foreign enforcement authority's request for a preservation direction relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character:
- there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character:
- granting the application would prejudice the sovereignty, security, or national interests of New Zealand.

New section 88A(4) provides that, in the new Part, certain offences are not offences of a political character and is identical to section 2(6) of the Mutual Assistance in Criminal Matters Act 1992.

New section 88E provides for the form and content of preservation directions under the new Part. It is similar to *new section 79G*.

New section 88F is identical to *new section 79H*.

Under *new section 88G*, a preservation direction under the new Part is generally in force for an initial period, specified in the direction, which can be up to 150 days.

Consequences if responsible constable believes that requested preservation direction would prejudice investigation, etc (new subpart 4)

New section 88H aligns with Article 29(6) of the Budapest Convention. The new section requires a constable who is responsible for informing a foreign enforcement authority of matters relating to its request for a preservation direction to inform the foreign enforcement authority if the constable forms the belief, before the requested preservation direction has been served, that serving it—

- would prejudice any investigation by the foreign enforcement authority in relation to the serious offence that is the subject of the request (for example, by threatening the confidentiality of the investigation or because it would risk the loss or modification of the documents); or
- would be unlikely to result in the preservation of the documents that the foreign enforcement authority seeks to be preserved.

If the responsible constable forms that belief before the application is made, the application may be made only if the foreign enforcement authority confirms its request.

If the responsible constable forms the belief after the application is made and before the Commissioner determines it,—

- the constable must also inform the Commissioner of the belief; and
- the Commissioner may grant the application only if the foreign enforcement authority confirms its request.

If the responsible constable forms the belief after the Commissioner grants the application but before the direction is served,—

- the constable must also inform the Commissioner of the belief; and
- the direction may be served only if the foreign enforcement authority confirms its request; and
- the direction is to be treated as not having been made if the foreign enforcement authority withdraws the request.

Renewal of preservation directions (new subpart 5)

New sections 88I to 88L provide for the renewal of preservation directions made under the new Part.

New section 88I(1) requires a constable to apply to the Commissioner for a preservation direction to be renewed if 3 conditions apply. The first condition is that the foreign enforcement authority requests the New Zealand Police to renew the preservation direction and makes the request before the direction expires.

The second condition is that a related mutual assistance request is in progress. This condition is similar to the third condition described in the analysis of *new section 88B* above.

The third condition is that the direction has not been renewed before, or has been renewed before but fewer than 4 times.

New section 88I(2) provides for the form and content of, and other matters relating to, the application.

Under *new section 88J*, the Commissioner must refuse to grant the application for renewal if the preservation direction has already been renewed 4 times. The Commissioner must otherwise grant the application for renewal, except if satisfied that grounds similar to the grounds under *new section 88D* are met (*see* the analysis of *new section 88D* above).

New section 88K allows a preservation direction to be renewed for a period of up to 180 days.

New section 88L requires an updated version of the preservation direction to be issued if the application for renewal is granted.

Continuation and revocation: effect of applications, etc, under Mutual Assistance in Criminal Matters Act 1992 (new subpart 6)

New subpart 6 contains *new sections 88M and 88N*. Under *new section 88M(1)*, the new subpart applies if—

- a request is made to the Attorney-General under *new section 43* of the Mutual Assistance in Criminal Matters Act 1992 for assistance in obtaining, under a production order against a person, documents covered by a preservation direction against the person; and
- the request is made before the preservation direction would otherwise expire; and
- the preservation direction and the request for the production order relate to the same investigation or proceedings.

The preservation direction continues in force in relation to all of the documents until revoked or partially revoked under *new section 88N* (*see new section 88M(2)*).

Generally, the preservation direction is revoked under *new section 88N* in relation to all of the documents covered by the direction if—

- the Attorney-General refuses a request of the foreign country concerned for assistance under *new section 43* of the Mutual Assistance in Criminal Matters Act 1992 in obtaining a production order against the person concerned; or

- a Judge determines an application under *new section 45* of that Act against the person that relates to all or any of the documents concerned.

New sections 43 and 45 of the Mutual Assistance in Criminal Matters Act 1992 are inserted by *clause 37* (see the related analysis below).

Reviews (new subpart 7)

New sections 88O to 88Q provide for a review of the Commissioner's decision to make or review a preservation direction under the new Part. The new sections are similar to *new sections 79J to 79L*, which provide for a review of the decision to make a preservation direction under *new subpart 2A of Part 3*. Key differences are as follows:

- *new subpart 2A of Part 3* does not provide for a review of the Commissioner's decision to renew a preservation direction because that new subpart does not enable a preservation direction to be renewed:
- an application for a review under the new Part must generally be made by the person against whom the preservation direction is made no later than 30 working days (instead of no later than 5 working days) after the direction or (if renewed) updated direction is given to the person and before it expires or is revoked (*new section 88O(3)*);
- the review under the new Part must generally be completed no later than 30 working days (instead of no later than 5 working days) after the application is lodged (*new section 88P(3)*).

Invalidity, offences, and immunities, etc (new subpart 8)

New section 88R provides for circumstances in which the preservation direction is invalid. The new section is generally equivalent to *new section 79M* and also deals with invalidity when a preservation direction under *new Part 3A* is purportedly renewed.

New section 88S has a similar effect to *new section 79N* (relating to a preservation direction under *new subpart 2A of Part 3*). The main difference is that *new section 88S* additionally empowers a constable to send to the foreign enforcement authority that requested the preservation direction—

- the record; or
- copies of the record; or
- the pathway information in a usable form; or
- any related information that is necessary to understand the pathway information.

Sending that material to the foreign enforcement authority generally aligns with Article 30 of the Budapest Convention.

New section 88T sets out definitions for *new sections 88U to 88W*.

New sections 88U to 88W set out and deal with 2 offences that are in the same terms as those set out in *new section 79Q* and concern disclosure of matters relating to a preservation direction.

New section 88U provides for 2 offences that apply to a person who is affected by a preservation direction (that is, a person against whom a preservation direction is made or any officer, employee, or agent of that person). Those offences are an offence of knowingly disclosing that a preservation direction has been made and an offence of knowingly disclosing information contained in a preservation direction.

New section 88U (like *new section 79Q*) provides that it is not an offence for an affected person to make the disclosure concerned in certain circumstances. A key difference from *new section 79Q* is that an affected person does not commit an offence against *new section 88U* if the section has ceased to apply under *new section 88V*. (See *new sections 79Q(4)(g)* and *79R*.)

The effect of *new section 88V* is that generally a person who is affected by a preservation direction does not commit an offence against *new section 88U* if the affected person makes the disclosure concerned after the direction expires or is revoked, except if the Commissioner notifies the person against whom the direction is made. The Commissioner may notify that person only if the Commissioner is satisfied that the disclosure—

- would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- would endanger the safety of any person; or
- would prejudice the supply of information to the law enforcement agency; or
- would prejudice any international relationships of the law enforcement agency; or
- would prejudice the security or defence of New Zealand.

New sections 88U(5) and *88W* provide for a partial lifting of the offence provided for in *new section 88U(2)* relating to disclosure of information contained in a preservation direction.

New section 88X is similar to *new section 79O*. It makes it an offence for a person to fail to comply with a preservation direction made under the new Part.

New section 88Y is similar to *new section 79P*. Under *new section 88Y*, a person commits an offence if the person applies for a preservation direction, or for renewal of a preservation direction, and the application contains any assertion or other statement that they know is false.

New sections 88Z and *88ZA* have a similar effect to *new sections 79S* and *79T*, which provide for immunity from civil liability for certain conduct of the Commissioner, reviewers, and others in good faith in performing functions under *new subpart 2A of Part 3*. The main difference is that *new sections 88Z* and *88ZA* extend to functions relating to renewing a preservation direction.

New section 88ZB is equivalent to *new section 79U*.

New section 88ZC is similar to *new section 79V*. It provides for service of preservation directions (including updated versions after renewal or review), and notices under the new Part.

New section 88ZD, similarly to *new section 79W*, requires the New Zealand Police to retain certain documents connected with applications under the new Part until the dates specified in the new section.

New section 88ZE requires the Commissioner to report annually on similar matters to those that the Commissioner must report on under *section 79Y*. It also requires the Commissioner to report annually on—

- renewals of preservation directions under the new Part; and
- reviews of decisions to renew preservation directions.

Other amendments

Clause 20 makes a consequential amendment that is related to *clause 10*.

Clause 21 inserts *new sections 179A and 179B*.

New section 179A, together with *section 179* (offence to disclose information acquired through search or surveillance), aligns with Articles 20(3) and 21(3) of the Budapest Convention to the extent that those sections relate to a surveillance device warrant that authorises an interception device to be used to intercept or record a telecommunication.

The new section has features in common with *new sections 79Q and 88U*. It makes it an offence for a person who has been called on to assist an enforcement officer to carry out activities authorised by a surveillance device warrant to knowingly disclose to another person that the warrant has been issued.

A person who commits an offence against the new section is liable to imprisonment for a maximum term of 6 months (if they are an individual) or a maximum fine of \$100,000 (if they are a body corporate). The penalty is consistent with *section 179*.

The new section provides that it is not an offence for an affected person to make the disclosure concerned in certain circumstances, including where the disclosure is made after the chief executive of the law enforcement agency concerned grants an application made by the person under *new section 179B*.

New section 179B enables an assistant to apply to the chief executive of the law enforcement agency for the lifting of any prohibition under *new section 179A* on disclosing that a warrant has been issued. The chief executive must grant the application if—

- the law enforcement agency decides to discontinue the investigation into the suspected offence that is the subject of the application for the direction; or
- any criminal proceedings that the law enforcement agency expects to be commenced in relation to the suspected offence have been commenced; or
- the chief executive decides for any other reason to give notice under this section in relation to the direction.

However, the chief executive is not required to grant the application if satisfied on reasonable grounds that disclosure that the direction has been issued or of the information contained in the documents concerned—

- would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- would endanger the safety of any person; or
- would prejudice the supply of information to the law enforcement agency; or
- would prejudice any international relationships of the law enforcement agency; or
- would prejudice the security or defence of New Zealand.

Clause 22 makes amendments to the regulation-making power in the principal Act that are related to the form of a preservation direction.

Clause 23 makes a consequential amendment that is related to *clause 24*.

Clause 24 inserts *new Schedule 1* set out in *Schedule 1* of this Bill. *New Schedule 1* contains transitional, savings, and other provisions that are related to amendments in *subpart 1*.

Clause 25(1) renumbers the Schedule as a consequence of *clause 24*. *Clause 25(2)* corrects cross-references. *Clause 25(3)* makes a consequential amendment that is related to amendments to the Mutual Assistance in Criminal Matters Act 1992 in *subpart 2*.

Clause 26 and *Part 1 of Schedule 2* provide for consequential amendments to the principal Act that are related to *clause 25(1)*.

Subpart 2—Amendments to Mutual Assistance in Criminal Matters Act 1992

Interpretation and general

Clause 27 provides for *subpart 2* to amend the Mutual Assistance in Criminal Matters Act 1992 (the **principal Act**).

Clause 28(1) inserts definitions into the interpretation section.

Clause 28(2) repeals definitions as a consequence of *clauses 35 to 37, 42, and 43*.

Requests by New Zealand

Clause 29 replaces section 20 with *new sections 20 and 20A*. Those new sections provide for the Attorney-General to request assistance from a foreign country in obtaining a thing (by search or surveillance if necessary), or obtaining information (by means of a surveillance device) where the Attorney-General is satisfied that there are reasonable grounds to believe that the thing or information is relevant to a criminal matter in respect of a New Zealand offence that is punishable by imprisonment for a term of 2 years or more.

New section 20, which provides for requests for assistance in obtaining a thing, generally recreates section 20 with 1 substantive change. The substantive change is that, if the thing is intangible (for example, computer data or a computer program), the Attorney-General must be satisfied that there are reasonable grounds to believe it is under the control of a person who is present in the foreign country (rather than that it is in the foreign country). To the extent that the new section relates to computer data or a computer program, it is broadly consistent with Articles 23, 25, and 31 of the Budapest Convention.

New section 20A provides for requests for assistance in obtaining information by means of a surveillance device. The new section is broadly consistent with Articles 23, 33, and 34 of the Budapest Convention to the extent that it relates to interception of telecommunications. The Convention refers to interception as being real-time collection.

If the Attorney-General is satisfied that there are reasonable grounds to believe that the foreign country would be likely to collect any of the information by means of highly restricted surveillance, *new section 20A(2)* allows the Attorney-General to make the request only if the offence is an eligible offence.

Highly restricted surveillance is defined (*see clause 28(1)*) as—

- surveillance by means of an interception device; or
- trespass surveillance other than by means of a tracking device.

(*See clause 28(1)* also for the definitions of interception device, trespass surveillance, and tracking device. Those terms are defined as having the same meanings as in the Search and Surveillance Act 2012.)

Eligible offence is defined (*see new section 20A(3)*) as—

- an offence that is punishable by imprisonment for a term of 7 years or more; or
- an offence against certain provisions of the Arms Act 1983, the Psychoactive Substances Act 2013, or the Crimes Act 1961.

The restriction imposed by *new section 20A(2)*—that, where highly restricted surveillance may be involved, the request may be made only if the offence is an eligible offence—is consistent with section 45 of the Search and Surveillance Act 2012. In particular,—

- the definitions of highly restricted surveillance and eligible offence inserted by *clause 28(1)* refer to the same kinds of surveillance and offences as are referred to in section 45 of that Act; and
- in effect, section 45 of that Act ensures that what the Bill defines as highly restricted surveillance cannot be authorised by that Act in respect of an investigation in New Zealand into an offence against the law of New Zealand, except if the offence is what the Bill defines as an eligible offence.

Clause 30 replaces a cross-heading with one that is generally consistent with the subpart heading inserted by *clause 41* for provisions relating to requests to New Zealand for warrants and orders under the Criminal Proceeds (Recovery) Act 2009.

**Requests to New Zealand for search warrants and production orders
(new subpart 5 of Part 3)**

Clause 35 replaces a cross-heading in Part 3 with a subpart heading as a consequence of *clause 38* (which inserts *new subpart 6 of Part 3*). It also inserts *new section 42A*, which contains definitions for the purposes of the new subpart.

Clause 36 replaces sections 43 and 44 with *new sections 43 to 46*. The new sections generally align with Articles 23 and 31 of the Budapest Convention to the extent that those sections allow requests to New Zealand by a foreign country to search, seize, or disclose computer data or a computer program and for search warrants and production orders to be issued or made in connection with those requests.

New sections 43 and 44 generally recreate the effect of sections 43 and 44 in relation to assistance in obtaining a thing under a search warrant. *New section 44* (like existing section 44) extends provisions of the Search and Surveillance Act 2012 relating to search warrants applied for and issued under that Act to search warrants applied for and issued under the new section.

New section 43 also allows a foreign country to request the Attorney-General to assist in obtaining a document, including computer data or a computer program, under a production order. (See the definition of document in *new section 42A* and in *new section 70* of the Search and Surveillance Act 2012.)

New sections 45 and 46 provide for matters relating to applications for, and other matters relating to, production orders. *New section 46* extends provisions of the Search and Surveillance Act 2012 relating to production orders applied for and made under that Act to production orders applied for and made under *new section 45*.

Clause 37 replaces sections 49 and 50 with *new sections 49 to 50*.

New sections 49 to 49B are concerned with the custody and disposal of things seized or produced under a search warrant or production order issued or made under *new subpart 5 of Part 3*.

New sections 49 and 49A(1) generally recreate the effect of section 49 in relation to things seized under a search warrant. The main substantive change is that those new provisions apply also in relation to documents produced under production orders.

New section 49A(2) to (7) and *new section 49B* respond to the majority judgment of the Supreme Court in *Dotcom v Attorney-General* [2014] NZSC 199; [2015] 1 NZLR 475 (see paragraph [201], in particular).

New section 49A(2) generally allows anything seized or produced under a search warrant or a production order issued or made under *new subpart 5 of Part 3* to be sent out of New Zealand only if—

- the Attorney-General has given written notice to suspects and other notifiable persons (as defined in *new section 49A(7)*) or a High Court Judge has dispensed with the Attorney-General's obligation to give notice; and
- any proceeding in New Zealand that is commenced by a notifiable person and relates to the search warrant, production order, or the proposed direction of

the Attorney-General relating to sending the thing overseas has been finally disposed of; and

- the foreign country concerned has given undertakings about any matter that the Attorney-General considers appropriate.

The effect of *new section 49A(4)* is that, if the Attorney-General is required to give notice, it must be given at least 10 working days before the Attorney-General directs the Commissioner to arrange for the seized or produced thing—

- to be transferred from the Commissioner's custody to the Attorney-General's (or another person's) custody for sending to an appropriate authority of a foreign country; or
- to be sent to an appropriate authority of a foreign country.

New section 49B(5) allows a High Court to dispense with the Attorney-General's obligation to give notice to suspects and other notifiable persons if satisfied—

- that compliance with that obligation would endanger the safety of any person; or
- that compliance with that obligation would prejudice ongoing investigations (whether or not in New Zealand) and that the public interest in avoiding that prejudice outweighs the public interest in the Attorney-General giving notice.

For that purpose,—

- the public interest in avoiding prejudice to ongoing investigations includes the public interest in avoiding that prejudice so as to maintain co-operation between New Zealand and the foreign country concerned in respect of criminal investigations (*see new section 49B(6)*); and
- the public interest in the Attorney-General giving the notice includes the public interest in ensuring that the seized thing is not sent out of New Zealand before—
 - the notifiable person concerned has an opportunity to commence proceedings in New Zealand challenging the legality of the issue or making, or execution, of the search warrant or production order and to obtain an order that the thing not be sent out of New Zealand; and
 - if the notifiable person commences proceedings of that kind, those proceedings are finally disposed of or the notifiable person agrees to the thing being sent out of New Zealand (*see new section 49B(7)*).

New section 50 generally recreates the effect of section 50, which deals with certificates provided at the request of the Central Authority of a foreign country about matters relating to the execution of search warrants issued under section 43. The main substantive change is that the new section applies also in relation to production orders.

Requests to New Zealand for surveillance device warrants (new subpart 6 of Part 3)

Overview of new subpart 6 of Part 3

Clause 38 inserts *new subpart 6 of Part 3 (new sections 50A to 50V)*. The new subpart generally aligns with Articles 23, 33, and 34 of the Budapest Convention to the extent that it relates to surveillance device warrants that authorise an interception device to be used to intercept or record a telecommunication.

Interpretation

New section 50A contains definitions for the purposes of the new subpart.

Requests

New section 50B allows the Attorney-General to grant a request by a foreign country by authorising the New Zealand Police to apply to a Judge for a surveillance device warrant under the new subpart if satisfied that certain conditions are met, including that—

- the request relates to a criminal matter in respect of an offence against the law of the foreign country that would be punishable by imprisonment for a term of 2 years or more if the offence were committed in New Zealand; and
- there are reasonable grounds to believe that the information that would be obtained under the proposed surveillance device warrant if it were issued is relevant to the criminal matter; and
- the foreign country has given appropriate undertakings about—
 - retaining or destroying raw surveillance data, excerpts from raw surveillance data, and any information obtained from raw surveillance data; and
 - any other matter that the Attorney-General considers appropriate.

Raw surveillance data is defined by *new section 50A*. The definition is identical to the definition of the same term in section 3(1) of the Search and Surveillance Act 2012. Raw surveillance data—

- means actual video recordings or actual audio recordings; and
- includes full transcripts, or substantial parts of transcripts, of audio recordings.

General provisions: applications, issue, and authorised activities

New section 50C allows a constable to apply to a Judge of the High Court for a surveillance device warrant if the Attorney-General authorises the New Zealand Police to do that. It allows the Judge to issue a surveillance device warrant if satisfied that there are reasonable grounds—

- to suspect that an offence against the law of a foreign country has been or will be committed that would be punishable by imprisonment for a term of 2 years or more if the offence were committed in New Zealand; and

- to believe that the proposed use of the surveillance warrant will obtain information that is evidential material in respect of the offence.

The surveillance device warrant may authorise 1 or more of the activities that may be authorised by section 46(1) of the Search and Surveillance Act 2012.

However, the Judge may issue a surveillance device warrant that allows highly restricted surveillance only if satisfied that there are reasonable grounds to suspect that the offence is an eligible offence. (*See clause 28(1)* for the definition of highly restricted surveillance and *new section 50A* for the definition of eligible offence.) This restriction—

- is consistent with section 45 of the Search and Surveillance Act 2012 (restrictions on some trespass surveillance and use of interception device); and
- is similar to a restriction on the Attorney-General's power to make a request to a foreign country for assistance in obtaining information by means of a surveillance device under *new section 20A*.

Other applicable provisions of Search and Surveillance Act 2012

New sections 50D to 50N generally extend provisions of the Search and Surveillance Act 2012 relating to surveillance device warrants applied for and issued under that Act to surveillance device warrants applied for and issued under the new subpart.

Dealing with material collected under warrant

New sections 50O to 50T provide for how material collected under a surveillance device warrant issued under the new subpart is to be dealt with.

Under *new section 50O*, any material collected under the warrant must be delivered into the custody of the Commissioner and kept in that custody until otherwise dealt with in accordance with—

- an order of a District Court Judge relating to privilege of a communication or information that is the subject of surveillance carried out under the warrant; or
- a direction of a High Court Judge, made after the Judge receives a surveillance device warrant report relating to the warrant, as to the destruction or retention of material obtained under the warrant; or
- any of *new sections 50P to 50T*; or
- the Public Records Act 2005 or any other legislation or rule of law.

New section 50P provides that *new sections 50Q to 50T* are subject to—

- any order of a District Court Judge, made after the Judge determines that a communication or information is privileged, requiring a record of a communication or information made as a consequence of the surveillance to be destroyed; and
- an order of a High Court Judge, made after the Judge receives a surveillance device warrant report relating to the warrant, as to the destruction or retention of material obtained under the warrant.

New section 50Q requires any material collected under the warrant issued under the new subpart to be dealt with in accordance with any written direction of the Attorney-General to the Commissioner.

New section 50R deals specifically with directions of the Attorney-General relating to the sending of that material to a foreign country. The material may be sent out of New Zealand only if the Attorney-General is satisfied that—

- a Judge has been provided with a surveillance device warrant report relating to the warrant and has completed the Judge’s review of the report; and
- the foreign country has given certain undertakings about retaining or destroying raw surveillance data, excerpts from raw surveillance data, and any information obtained from raw surveillance data; and
- the foreign country has given any other undertakings that the Attorney-General considers appropriate.

New sections 50S and 50T deal specifically with raw surveillance data that remains in New Zealand. In particular, *new section 50S* applies sections 63 and 64 of the Search and Surveillance Act 2012 to—

- evidential material, obtained in relation to an offence against the law of New Zealand in the course of surveillance under a warrant, to the extent that the material is raw surveillance data that is not directed under *new section 50R* to be sent out of New Zealand; and
- excerpts from that data; and
- information obtained from that data.

Those sections of the Search and Surveillance Act 2012 set out rules relating to retaining and destroying raw surveillance data (defined by *new section 50A*), excerpts from that data, and information obtained from that data.

New section 50T deals with the destruction of other raw surveillance data, excerpts from that data, and information obtained from that data that remain in New Zealand.

Other

New section 50U provides that certain evidential material obtained in relation to a New Zealand offence when carrying out activities authorised by a surveillance device warrant issued under the new subpart is not inadmissible in criminal proceedings in New Zealand merely because the warrant was issued in relation to a foreign country’s offence. The new section is generally equivalent to section 57 of the Search and Surveillance Act 2012.

New section 50V requires the Commissioner to include in the annual reports for the New Zealand Police certain information about surveillance device warrants issued and applied for under the new subpart. The new section is generally equivalent to sections 170(1)(f), (2)(e), and (3) and 172 of the Search and Surveillance Act 2012.

Miscellaneous amendments

Clauses 31 to 35 and 39 to 41 replace cross-headings in Part 3 with subpart headings as a consequence of *clause 38* (which inserts *new subpart 6 of Part 3*).

Clauses 42 and 43 make amendments that are related to the repeal of the definitions of examination order and production order by *clause 28(2)*.

Clause 44 and *Part 2 of Schedule 2* provide for a consequential amendment (to other legislation) that is related to amendments set out in *subpart 2*.

Subpart 3—Amendments to Telecommunications (Interception Capability and Security) Act 2013

Clause 45 provides for *subpart 3* to amend the Telecommunications (Interception Capability and Security) Act 2013 (the **principal Act**).

Clause 46 amends the interpretation section as a consequence of *clause 47*.

Clause 47 inserts *new section 3AB*, which defines traffic data and related concepts. In effect, the term traffic data replaces the term call associated data that currently appears in section 3(1) with some substantive changes to align with the concept of traffic data appearing in Article 1 of the Budapest Convention. The concept appears in various provisions of the principal Act that align with Articles 20 and 21 of the Budapest Convention, including sections 10, 11, and 24.

Clauses 48 to 52 make amendments as a consequence of *clauses 46 and 47*.

Clause 53 and *Part 3 of Schedule 2* provide for consequential amendments to legislation that are related to amendments set out in *subpart 3*.

Part 2

Amendments to Crimes Act 1961

Clause 54 provides for *Part 2* to amend the Crimes Act 1961 (the **principal Act**).

Clause 55 repeals section 216B(7). *Clause 10* transfers the substance of the repealed provision to the Search and Surveillance Act 2012 as *new section 64A* of that Act.

Clause 58(1) and (2) amend section 228B. Section 228B makes it an offence for a person, without lawful authority or excuse, to possess, sell, or dispose of goods designed, manufactured, or adapted with intent to facilitate the commission of crimes involving dishonesty. The amendments extend section 228B to procuring those goods. The term crimes involving dishonesty is defined in section 2(1) and includes offences involving computers (set out in sections 249 to 252 and *new sections 253 and 254*). Section 228B, as amended by *clause 58(1) and (2)*, aligns with Article 6(1)(a) of the Budapest Convention to the extent that Article 6(1)(a) relates to possessing, selling, disposing of, or procuring goods that are designed or adapted for the purpose of committing any offence along the lines of those set out in any of the following sections:

- section 249 (accessing computer system for dishonest purpose):

- section 250 (damaging or interfering with computer system):
- section 252 (accessing computer system without authorisation).

Clauses 56, 58(3), and 59 renumber and reposition sections 228A to 228C under a new cross-heading inserted by *clause 57*. Sections 228A to 228C currently appear in a group of offences relating to unlawful taking. However, the new sections relate to goods that facilitate the commission of crimes involving dishonesty (as reflected in the new cross-heading) and do not relate to unlawful taking.

Clause 60 makes an amendment that is a consequence of the amendment made by *clause 62*.

Clause 61 repeals section 251.

Clause 62 inserts *new sections 253 and 254*.

New section 253 makes it an offence for a person to design, write, or adapt software if the resulting software would enable a person to commit an offence against section 249, 250, or 252 and they either intend to use the resulting software, or intend any other person to use it, to commit an offence against that section. The new section aligns with Article 6 of the Budapest Convention, to the extent that Article 6 relates to producing computer programs (referred to in the principal Act as software) for the purpose of committing any of the offences along the lines of those set out in sections 249, 250, and 252.

New section 254(1) makes it an offence for a person to deal in software or other information if the software or other information would enable another person to access a computer system without authorisation and the person—

- promotes the software or other information as being useful for committing an offence and knows or is reckless as to whether it will be used to commit an offence; or
- intends the software or other information to be used by any other person to commit an offence; or
- knows that the sole or main use of the software or other information is to commit an offence.

New section 254 generally recreates the effect of section 251 (which is repealed by *clause 61*). Section 251 is concerned with—

- dealing in software or other information in various ways (for example, by selling or supplying it to another person) that would enable unauthorised access to a computer system; and
- possessing software or other information that would enable unauthorised access to a computer system.

The existing section, to the extent that it relates to software and certain other kinds of information (for example computer passwords), generally aligns with Article 6 of the Budapest Convention. The main substantive changes in *new section 254*, which

ensure more complete alignment with Article 6 of the Budapest Convention, are as follows:

- procuring the relevant software or other information is added to the kinds of dealings covered by the offence currently set out in section 251(1) (*see new section 254(2)(f)*):
- the offence extends to a person who intends software or other information to be used by any other person to commit an offence (*see new section 254(1)(b)*).

Hon Paul Goldsmith

Budapest Convention and Related Matters Legislation Amendment Bill

Government Bill

Contents

		Page
1	Title	9
2	Commencement	9
Part 1		
Amendments relating to investigatory tools		
Subpart 1—Amendments to Search and Surveillance Act 2012		
3	Principal Act	10
4	Section 3 amended (Interpretation)	10
5	New section 3A inserted (Transitional, savings, and related provisions)	10
	3A Transitional, savings, and related provisions	10
6	Section 42 replaced (Other provisions that apply to examination orders)	10
	42 Other provisions that apply to examination orders	10
7	Section 49 amended (Application for surveillance device warrant)	11
8	Section 55 amended (Form and content of surveillance device warrant)	11
9	Section 58 replaced (Other provisions that apply to surveillance device warrants)	11
	58 Other provisions that apply to surveillance device warrants	11
10	New section 64A inserted (Record of information obtained, made, or generated by assistant)	11
	64A Record of information obtained, made, or generated by assistant	12

**Budapest Convention and Related Matters Legislation
Amendment Bill**

11	Section 70 replaced (Interpretation)	12
	70 Meaning of document	12
12	Section 71 amended (Enforcement officer may apply for production order)	12
13	Section 75 amended (Form and content of production order)	13
14	New section 75A inserted (Production orders against network operators relating to traffic data, etc)	13
	75A Production orders against network operators relating to traffic data, etc	13
15	Section 77 replaced (Other provisions applying to production orders)	13
	77 Other provisions that apply to production orders	13
16	Section 78 amended (Documents produced under production order)	13
17	Section 79 amended (Copy of retained document to be given)	14
18	New subpart 2A of Part 3 inserted	14
Subpart 2A—Preservation directions		
<i>Interpretation</i>		
79A	Interpretation	14
<i>Applications for preservation directions</i>		
79B	Enforcement officer may apply for preservation direction	15
79C	Form and content of application	15
79D	Applications made orally	15
<i>Preservation directions: making, duration, and other matters</i>		
79E	Conditions for making preservation direction	16
79F	Commissioner may make preservation direction	17
79G	Form and content of preservation direction	17
79H	Preservation directions against network operators relating to traffic data, etc	18
79I	Duration of preservation direction	19
<i>Reviews</i>		
79J	Right of review	19
79K	How review must be conducted	20
79L	Notice, etc, to be given after review is completed	20
<i>Invalidity</i>		
79M	When preservation direction is invalid	21
<i>Retention, copying, etc, of produced record of pathway information</i>		
79N	Record of pathway information produced under preservation direction	21

**Budapest Convention and Related Matters Legislation
Amendment Bill**

<i>Offences</i>		
79O	Failing to comply with preservation direction	22
79P	False application for preservation direction	22
79Q	Disclosing matters relating to preservation direction	22
79R	Chief executive to give written notice for section 79Q(4)(g)	23
<i>Immunities</i>		
79S	Immunities relating to functions of Commissioner and reviewers	24
79T	Immunities relating to obtaining or executing preservation directions	25
<i>Effect of court proceedings</i>		
79U	Effect of court proceedings	25
<i>Service of documents</i>		
79V	Service of preservation directions and notices	25
<i>Retention of documents</i>		
79W	New Zealand Police to retain applications and related documents	25
79X	Documents to be retained by other applicants to whom preservation direction is issued	26
<i>Annual reporting</i>		
79Y	Annual reporting by Commissioner	27
19	New Part 3A inserted	28
Part 3A		
Preservation directions relating to foreign investigations or proceedings		
Subpart 1—Interpretation		
88A	Interpretation	28
Subpart 2—Applications for preservation directions		
88B	Constable to apply for preservation direction requested by foreign enforcement authority	30
88C	Form and content of application	30
Subpart 3—Preservation directions: making, initial duration, and other matters		
88D	Commissioner to make preservation direction	31
88E	Form and content	32
88F	Preservation directions against network operators relating to traffic data, etc	32
88G	Initial duration of preservation direction	32

**Budapest Convention and Related Matters Legislation
Amendment Bill**

	Subpart 4—Consequences if responsible constable believes that requested preservation direction would prejudice investigation, etc	
88H	Foreign enforcement authority to be informed and other consequences of belief	33
	Subpart 5—Renewal of preservation directions	
88I	Application for renewal	34
88J	Granting of application	34
88K	Period for which preservation direction continues in force	35
88L	Updated version of preservation direction must be issued	35
	Subpart 6—Continuation and revocation: effect of requests and applications under Mutual Assistance in Criminal Matters Act 1992	
88M	Preservation direction to continue: request for assistance by production order	35
88N	Whole or partial revocation of preservation direction	36
	Subpart 7—Reviews	
88O	Right of review	36
88P	How review must be conducted	37
88Q	Notice, etc, to be given after review is completed	38
	Subpart 8—Invalidity, offences, and immunities, etc	
	<i>Invalidity</i>	
88R	When preservation direction is invalid	38
	<i>Copying, etc, of produced record of pathway information</i>	
88S	Pathway information produced under preservation direction	39
	<i>Offences relating to disclosure</i>	
88T	Definitions for sections 88U to 88W	39
88U	Offences	40
88V	When section 88U ceases to apply to affected person	41
88W	Notice for section 88U(5): when section 88U(2) partially lifted	42
	<i>Other offences</i>	
88X	Failing to comply with preservation direction	42
88Y	False application for preservation direction or renewal	43
	<i>Immunities</i>	
88Z	Immunities relating to functions of Commissioner and reviewers	43

**Budapest Convention and Related Matters Legislation
Amendment Bill**

88ZA	Immunities relating to obtaining, renewing, or executing preservation direction	43
	<i>Effect of court proceedings</i>	
88ZB	Effect of court proceedings	44
	<i>Service of documents</i>	
88ZC	Service of preservation directions, notices, etc	44
	<i>Retention of documents</i>	
88ZD	New Zealand Police to retain applications and related documents	44
	<i>Annual reporting</i>	
88ZE	Annual reporting by Commissioner	45
20	Section 162 amended (Other copies and generated material may be retained)	47
21	New sections 179A and 179B inserted	47
	179A Disclosing that surveillance device warrant has been issued	47
	179B Application for prohibition on disclosure to be lifted	47
22	Section 342 amended (Regulations)	48
23	Cross-heading above section 343 replaced	48
	<i>Transitional provisions relating to this Act as enacted</i>	
24	New Schedule 1 inserted	49
25	Schedule amended	49
26	Consequential amendments related to renumbering of Schedule Subpart 2—Amendments to Mutual Assistance in Criminal Matters Act 1992	49
27	Principal Act	49
28	Section 2 amended (Interpretation)	49
29	Section 20 and cross-heading replaced	50
	<i>Assistance in obtaining things</i>	
20	Assistance in obtaining thing	50
	<i>Assistance relating to surveillance devices</i>	
20A	Assistance in obtaining information by means of surveillance device	50
30	Cross-heading above section 22 replaced	51
	<i>Requests to issue warrants and orders similar to those under Criminal Proceeds (Recovery) Act 2009</i>	
31	Cross-heading above section 24 replaced	51
	<i>Subpart 1—Preliminary provisions</i>	
32	Cross-heading above section 30 replaced	51

**Budapest Convention and Related Matters Legislation
Amendment Bill**

	Subpart 2—Assistance in locating or identifying persons	
33	Cross-heading above section 31 replaced	51
	Subpart 3—Assistance in obtaining evidence in New Zealand	
34	Cross-heading above section 37 replaced	51
	Subpart 4—Assistance in arranging attendance of person in foreign country	
35	Cross-heading above section 43 replaced	52
	Subpart 5—Requests for search warrants and production orders	
	<i>Interpretation</i>	
	42A Interpretation	52
36	Sections 43 and 44 replaced	52
	<i>Requests</i>	
	43 Assistance in obtaining thing	52
	<i>Search warrants</i>	
	44 Applications, issue, etc	53
	<i>Production orders</i>	
	45 General provisions: applications and making	53
	46 Applicable provisions of Search and Surveillance Act 2012	53
37	Sections 49 and 50 replaced	55
	<i>Custody and disposal of things seized or produced</i>	
	49 General provisions	55
	49A Sending thing out of New Zealand	55
	49B Dispensing with obligation to give notice	57
	<i>Certificate</i>	
	50 Attorney-General to provide certificate as to search and seizure, or production	58
38	New subpart 6 of Part 3 inserted	59
	Subpart 6—Requests for surveillance device warrants	
	<i>Interpretation</i>	
	50A Interpretation	59
	<i>Requests</i>	
	50B Assistance in obtaining evidential material under surveillance device warrant	60

**Budapest Convention and Related Matters Legislation
Amendment Bill**

	<i>General provisions: applications, issue, and authorised activities</i>	
50C	Applications, issue, and authorised activities	60
	<i>Other applicable provisions of Search and Surveillance Act 2012</i>	
50D	Applications and retention of documents	61
50E	Restriction on issue of warrant facilitating surveillance of communications between lawyer and client	61
50F	Form and content of warrant	61
50G	Persons authorised by warrant	62
50H	Surveillance device warrant reports	62
50I	Raw surveillance data and other information acquired by assistant	62
50J	Transmission of warrant	63
50K	When warrant is invalid	63
50L	Privilege and confidentiality	63
50M	Immunities and offences	63
50N	Effect of court proceedings	63
	<i>Dealing with material collected under warrant</i>	
50O	Collected material to be delivered into custody of Commissioner	63
50P	Sections 50Q to 50T subject to Judge’s order or direction about destruction or retention of material	64
50Q	Attorney-General’s direction relating to collected material generally	64
50R	Direction relating to sending material to foreign country	64
50S	Retention and destruction of raw surveillance data, etc, that is specified evidential material relating to New Zealand offence	65
50T	Destruction or retention of other raw surveillance data, etc, that remains in New Zealand	65
	<i>Other</i>	
50U	Admissibility of evidential material relating to New Zealand offence	66
50V	Annual reporting by Commissioner of Police	66
39	Cross-heading above section 51 replaced	67
	Subpart 7—Assistance in arranging service of process	
40	Cross-heading above section 54 replaced	68
	Subpart 8—Requests to enforce foreign restraining orders and foreign forfeiture orders	
41	Cross-heading above section 59 replaced	68

**Budapest Convention and Related Matters Legislation
Amendment Bill**

Subpart 9—Requests for warrants and orders under Criminal Proceeds (Recovery) Act 2009		
42	Section 61 amended (Request for production order in New Zealand)	68
43	Section 62 amended (Request for examination order in New Zealand)	68
44	Consequential amendments related to this subpart	68
Subpart 3—Amendments to Telecommunications (Interception Capability and Security) Act 2013		
45	Principal Act	68
46	Section 3 amended (Interpretation)	68
47	New section 3AB inserted (Meaning of traffic data)	68
48	3AB Meaning of traffic data	68
48	Section 10 amended (When duty to have full interception capability is complied with)	70
49	Section 11 amended (Interception ready)	70
50	Section 24 amended (Duty to assist)	70
51	Section 42 amended (Notice relating to formatting)	70
52	Section 44 amended (Formatting before commencement of this Act)	70
53	Consequential amendments related to this subpart	70
Part 2 Amendments to Crimes Act 1961		
54	Principal Act	70
55	Section 216B amended (Prohibition on use of interception devices)	70
56	Section 228A renumbered as section 239A and repositioned (Designing, manufacturing, or adapting goods with intent to facilitate commission of crimes involving dishonesty)	70
57	New cross-heading above section 239A (as renumbered and repositioned by section 56 of this Act) inserted	71
<i>Goods that facilitate commission of crimes involving dishonesty</i>		
58	Section 228B amended, renumbered as section 239B, and repositioned (Possessing, selling, or disposing of goods designed, manufactured, or adapted with intent to facilitate commission of crimes involving dishonesty)	71
59	Section 228C renumbered as section 239C and repositioned (Possessing goods capable of being used to facilitate crimes involving dishonesty with intent to facilitate commission of those offences)	71
60	Section 248 amended (Interpretation)	71

**Budapest Convention and Related Matters Legislation
Amendment Bill**

cl 2

61	Section 251 repealed (Making, selling, or distributing or possessing software for committing crime)	71
62	New sections 253 and 254 inserted	71
	253 Designing, writing, or adapting software for committing certain crimes	71
	254 Dealing in or possessing software or other information for committing crime	72
	Schedule 1	73
	New Schedule 1 inserted into Search and Surveillance Act 2012	
	Schedule 2	74
	Consequential amendments related to Part 1	

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Budapest Convention and Related Matters Legislation Amendment Act **2024**.

2 Commencement

5

- (1) This Act comes into force on a date or dates set by Order in Council.
- (2) Any part of this Act that has not come into force by **1 October 2025** comes into force then.
- (3) However, the following provisions come into force on the day after Royal assent: 10
 - (a) **section 5:**
 - (b) **sections 10 and 20:**
 - (c) **section 23:**
 - (d) **section 24**, but only for the purpose of giving effect to all of the **Schedule 1** (except for **clauses 2 and 4** of that schedule) that is set out in **Schedule 1**: 15
 - (e) **sections 25 and 26:**
 - (f) **Part 2.**
- (4) An Order in Council made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 20

Part 1
Amendments relating to investigatory tools

Subpart 1—Amendments to Search and Surveillance Act 2012

3 Principal Act

This subpart amends the Search and Surveillance Act 2012. 5

4 Section 3 amended (Interpretation)

In section 3(1), insert in their appropriate alphabetical order:

intelligence and security agency means—

- (a) the New Zealand Security Intelligence Service; or
- (b) the Government Communications Security Bureau 10

lawyer means a lawyer within the meaning of section 6 of the Lawyers and Conveyancers Act 2006

network operator has the same meaning as in section 3(1) of the Telecommunications (Interception Capability and Security) Act 2013

surveillance power means— 15

- (a) a surveillance device warrant issued under subpart 1 of Part 3 and the power to carry out the activities authorised by the warrant; or
- (b) a warrantless surveillance power

traffic data has the same meaning as in **section 3AB** of the Telecommunications (Interception Capability and Security) Act 2013 20

warrantless surveillance power means a power conferred by section 48

5 New section 3A inserted (Transitional, savings, and related provisions)

After section 3, insert:

3A Transitional, savings, and related provisions

- (1) The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 25
- (2) See sections 343 to 356 for transitional provisions relating to this Act as enacted.

6 Section 42 replaced (Other provisions that apply to examination orders)

Replace section 42 with: 30

42 Other provisions that apply to examination orders

- (1) Section 105 (transmission of search warrants) applies to examination orders—
 - (a) as if a reference in that section to a warrant or search warrant were a reference to an examination order; and

- (b) as if a reference in that section to an issuing officer were a reference to the Judge issuing an examination order.
- (2) Section 107 (when a search warrant is invalid) applies to examination orders—
- (a) as if a reference in that section to a search warrant were a reference to an examination order; and 5
- (b) as if a reference in that section to the grounds or conditions for lawful issue of a warrant were a reference to the conditions specified in section 34 or 36, as the case may be.
- 7 Section 49 amended (Application for surveillance device warrant)**
- In section 49(1)(b), after “offence”, insert “(see section 51(a)(i))”. 10
- 8 Section 55 amended (Form and content of surveillance device warrant)**
- (1) In section 55(3)(b), after “offence”, insert “(see section 51(a)(i))”.
- (2) Replace section 55(3)(g) with:
- (g) that an enforcement officer who, while carrying out the activities authorised by the warrant, obtains the content of a telecommunication may direct the relevant network operator to provide traffic data that is related to that telecommunication and stored in the ordinary course of business: 15
- 9 Section 58 replaced (Other provisions that apply to surveillance device warrants)**
- Replace section 58 with: 20
- 58 Other provisions that apply to surveillance device warrants**
- (1) Section 105 (transmission of search warrants) applies to surveillance device warrants—
- (a) as if a reference in that section to a warrant or search warrant were a reference to a surveillance device warrant; and 25
- (b) as if a reference in that section to an issuing officer were a reference to the Judge issuing a surveillance device warrant.
- (2) Section 107 (when a search warrant is invalid) applies to surveillance device warrants—
- (a) as if a reference in that section to a search warrant were a reference to a surveillance device warrant; and 30
- (b) as if a reference in that section to the grounds or conditions for lawful issue of a warrant were a reference to the conditions specified in section 51.
- 10 New section 64A inserted (Record of information obtained, made, or generated by assistant)** 35
- After section 64, insert:

64A Record of information obtained, made, or generated by assistant

- (1) This section applies if, as a consequence of assisting an enforcement officer to whom a surveillance device warrant is directed, a person obtains, makes, or generates any record of information.
- (2) The person must ensure that, as soon as is reasonably practicable after the warrant expires, that record—
 - (a) is destroyed; or
 - (b) is given to the law enforcement agency that employed or engaged the enforcement officer (if the record has not been given to that agency already).

5

10

Guidance note

See *also* section 179, which makes it an offence for a person who acquires information as a consequence of the exercise of a search or surveillance power to knowingly disclose that information, except in the performance of the person's duties, functions, or powers.

15

11 Section 70 replaced (Interpretation)

Replace section 70 with:

70 Meaning of document

In this subpart, **document** includes—

- (a) computer data; and
- (b) a computer program; and
- (c) a record of—
 - (i) traffic data; or
 - (ii) the content of a telecommunication.

20

12 Section 71 amended (Enforcement officer may apply for production order)

25

- (1) Repeal section 71(2)(f).
- (2) After section 71(2)(g), insert:
 - (h) if the documents are sought to be produced on 1 occasion only, the facts relied on to show reasonable grounds to believe that those documents are in the possession or under the control of the person against whom the order is sought:
 - (i) if the documents are sought to be produced on an ongoing basis, the facts relied on to show reasonable grounds to believe that those documents—
 - (i) are in the possession or under the control of the person against whom the order is sought; or

30

35

- (ii) will come into that person’s possession or under their control while the order is in force (if made and in force for the period sought).

13 Section 75 amended (Form and content of production order)

- (1) Replace section 75(1)(a) with: 5
 - (a) to give the enforcement officer who applied for the order, or a person identified in the order,—
 - (i) any documents described in the order that are in the possession or under the control of person A; and
 - (ii) if **section 71(2)(i)(ii)** applies to the order, any documents described in the order that come into the possession or under the control of person A while the order is in force; and 10
- (2) In section 75(1)(b), replace “any of those documents” with “any documents described in the order”.

14 New section 75A inserted (Production orders against network operators relating to traffic data, etc) 15

After section 75, insert:

75A Production orders against network operators relating to traffic data, etc

A production order may require a network operator to produce a record of traffic data or of the content of telecommunications only to the extent that the network operator stores that record in the ordinary course of its business. 20

15 Section 77 replaced (Other provisions applying to production orders)

Replace section 77 with:

77 Other provisions that apply to production orders

- (1) Section 105 (transmission of search warrants) applies to production orders as if a reference in that section to a warrant or search warrant were a reference to a production order. 25
- (2) Section 107 (when a search warrant is invalid) applies to production orders—
 - (a) as if a reference in that section to a search warrant were a reference to a production order; and 30
 - (b) as if a reference in that section to the grounds or conditions for lawful issue of a warrant were a reference to the conditions specified in section 72.

16 Section 78 amended (Documents produced under production order)

- (1) In section 78, replace “the enforcement officer who applied for the order” with “an appropriate enforcement officer”. 35

- (2) In section 78, insert as subsection (2):
- (2) In this section, **appropriate enforcement officer**, in relation to a production order, means—
- (a) the enforcement officer who applied for the order; or
 - (b) another enforcement officer employed or engaged by the same law enforcement agency as the enforcement officer who applied for the order.

17 Section 79 amended (Copy of retained document to be given)

In section 79, replace “78(a)” with “**78(1)(a)**”.

18 New subpart 2A of Part 3 inserted

After section 79, insert:

Subpart 2A—Preservation directions

Interpretation

79A Interpretation

In this subpart, unless the context otherwise requires,—

appropriate enforcement officer, in relation to a preservation direction, means—

- (a) the enforcement officer who applied for the direction; or
- (b) another enforcement officer employed or engaged by the same law enforcement agency as the enforcement officer who applied for the direction

document has the same meaning as in subpart 2

pathway information means traffic data that identifies the path of a telecommunication

preservation direction means a preservation direction made under this subpart

preserve, in relation to a document, means protect the document from change or deterioration

telecommunication and **telecommunications service** have the same meanings as in section 3(1) of the Telecommunications (Interception Capability and Security) Act 2013

telecommunications service provider means a person that is either of the following (as defined in section 3(1) of the Telecommunications (Interception Capability and Security) Act 2013):

- (a) a network operator;
- (b) a service provider.

Applications for preservation directions

79B Enforcement officer may apply for preservation direction

An enforcement officer who may apply for a search warrant to obtain documents may apply to the Commissioner for a preservation direction against a person in respect of those documents if the enforcement officer is satisfied that the conditions specified in **section 79E** for making the direction against the person are met.

5

79C Form and content of application

(1) An application for a preservation direction—

- (a) must be in writing; and
- (b) may be transmitted to the Commissioner electronically.

10

(2) The application must—

- (a) state the name of the applicant;
- (b) specify the provision that authorises an application for a search warrant to be made in respect of the suspected offence;
- (c) describe the offence that the applicant suspects has been, is being, or will be committed;
- (d) set out the facts relied on to show reasonable grounds to hold that suspicion;
- (e) describe the documents that the applicant seeks to be preserved;
- (f) describe any record of pathway information that the applicant seeks to be produced;
- (g) set out the facts relied on to show reasonable grounds to believe that the documents (including any record of pathway information that the applicant seeks to be produced) are in the possession or under the control of the person against whom the order is sought.

15

20

25

(3) The application must contain or be accompanied by a statement by the applicant confirming the truth and accuracy of the contents of the application.

(4) The Commissioner may require the applicant to supply further information concerning the grounds on which the applicant seeks the preservation direction.

30

79D Applications made orally

(1) Despite **section 79C**, the Commissioner may allow the application to be made orally (for example, by telephone or in person) and excuse the applicant from putting all or part of the application (including any required material) in writing.

35

(2) The Commissioner may allow the application to be made orally and excuse the applicant only if—

- (a) the Commissioner is satisfied—
- (i) that the delay that would be caused by requiring an applicant to put all or any part of the application (including any required material) in writing would compromise the effectiveness of the preservation direction (if made); and 5
 - (ii) that the question of whether the direction should be issued can properly be determined on the basis of an oral application (together with the information referred to in **paragraph (b)**); and
- (b) any further information that the Commissioner requires under **section 79C(4)** is supplied (whether orally, or partly orally and partly in writing) to the Commissioner. 10
- (3) If the Commissioner allows the application to be made orally, the Commissioner must—
- (a) ensure that the applicant orally affirms the truth and accuracy of the application when it is made; and 15
 - (b) record the following particulars and information as soon as practicable:
 - (i) particulars of the facts that the Commissioner relied on to be satisfied of the matters set out in **subsection (2)(a)**: 20
 - (ii) the particulars that the application is required to set out under **section 79C(2)** that were supplied orally to the Commissioner: 20
 - (iii) any further information that the Commissioner required under **section 79C(4)** that was supplied orally to the Commissioner.

Preservation directions: making, duration, and other matters

79E Conditions for making preservation direction

- The conditions for making a preservation direction are that— 25
- (a) the applicant (or another enforcement officer who may apply for a search warrant to obtain the documents that the applicant seeks to be preserved or produced under the proposed direction)—
 - (i) is about to apply for a production order in respect of the documents that the applicant seeks to be preserved; or 30
 - (ii) has applied for a production order in respect of those documents and an issuing officer has not yet granted or refused the application for the order; and
 - (b) there are reasonable grounds to suspect that an offence has been, is being, or will be committed; and 35
 - (c) that offence is an offence in respect of which this Act or any enactment specified in column 2 of **Schedule 2** authorises an enforcement officer to apply for a search warrant; and

- (d) there are reasonable grounds to believe that the documents (including any record of pathway information that the applicant seeks to be produced) under the proposed direction—
- (i) are evidential material in respect of the offence; and
 - (ii) are particularly vulnerable to loss or modification; and
 - (iii) are in the possession or under the control of the person against whom the direction is sought; and
- (e) if the applicant seeks to have any record of pathway information produced under the proposed direction,—
- (i) the applicant’s purpose in seeking to have the record produced is to facilitate tracing of all telecommunications service providers involved in transmitting the related telecommunication; and
 - (ii) the applicant seeks to have only as much of the record produced as is necessary for that purpose.

Examples

For the purposes of **paragraph (d)(ii)**, examples of circumstances in which there may be reasonable grounds to believe that the documents are particularly vulnerable to loss or modification include the following:

Example 1

There are reasonable grounds to believe that, before an application for a production order in respect of the documents is able to be determined, the documents will be—

- deleted, erased, or otherwise disposed of; or
- modified.

Example 2

There are reasonable grounds to believe that the documents are being stored insecurely.

Example 3

In the case of computer data, there are reasonable grounds to believe that the data would ordinarily be deleted or erased when the medium used to store the data is used to store other data.

79F Commissioner may make preservation direction

On an application made under this subpart, the Commissioner may make a preservation direction against a person if satisfied that the conditions specified in **section 79E** for making the direction are met.

79G Form and content of preservation direction

- (1) A preservation direction must be in the prescribed form, if any, and must require the person against whom it is made (the **directly affected person**)—

- (a) to preserve, while the direction is in force, any documents described in the direction that are in the possession or under the control of the directly affected person; and
 - (b) to produce to the enforcement officer who applied for the direction, or a person identified in the direction, any record of pathway information described in the direction that is in the possession or under the control of the directly affected person; and 5
 - (c) if any of the documents (including any record of pathway information) described in the direction are not, or are no longer, in the possession or under the control of the directly affected person, to disclose (by the time, if any, specified in the direction and to the best of that person’s knowledge or belief) the location of those documents to— 10
 - (i) the enforcement officer who applied for the direction; or
 - (ii) a person identified in the direction.
 - (2) A preservation direction must specify— 15
 - (a) the name of the directly affected person; and
 - (b) the grounds on which the direction is made.
 - (3) If the preservation direction requires the directly affected person to produce any record of pathway information,—
 - (a) the preservation direction must also specify the way in which, and a time by which, the record must be produced; and 20
 - (b) that time must not be any earlier than a time on the tenth day after the date on which the direction is given to the directly affected person.
 - (4) A preservation direction may describe any documents required to be preserved by reference to a class or category of document. 25
 - (5) A preservation direction may describe any record of pathway information required to be produced by reference to a class or category of record.
 - (6) If a preservation direction is made against a body corporate or an unincorporated body, the direction may specify an individual (whether by name or by reference to a position held in the body) who must comply with the direction as the body’s representative. 30
- 79H Preservation directions against network operators relating to traffic data, etc**
- A preservation direction 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. 35

79I Duration of preservation direction

- (1) A preservation direction against a person is in force until the end of the period specified in the direction (not exceeding 20 days after the date on which the direction is made).
- (2) However, if an application is made for a production order against the person in relation to all or any of the documents described in a preservation direction before the direction expires, the preservation direction—
 - (a) continues in force until the application is determined; and
 - (b) is revoked when the application is determined.
- (3) **Subsection (2)** applies only if the preservation direction and the application for the production order relate to the same investigation.
- (4) If **subsection (2)** applies, the Commissioner must give written notice to the person against whom the preservation direction was made, as soon as practicable after the application for a production order is made and before it is determined, of the effect of **subsection (2)(a)**.
- (5) However, the Commissioner is not required to give the notice if the application for the production order is determined before it is practicable to give the notice.
- (6) If a preservation direction is revoked under **subsection (2)(b)**, the Commissioner must give written notice to the person against whom the direction was made that it is revoked.
- (7) However, the Commissioner is not required to give the notice if the application for the production order is granted.

Reviews

79J Right of review

- (1) A person against whom a preservation direction is made may apply to the Commissioner, in the approved manner (if any), for a review of the Commissioner's decision to make the direction.
- (2) An application must state—
 - (a) the decision that the applicant wishes to be reviewed; and
 - (b) why the applicant thinks the decision should be reviewed; and
 - (c) the review outcome that the applicant seeks.
- (3) An application must be made—
 - (a) no later than the default closing date, which is 5 working days after the date on which the preservation direction is given to the person; and
 - (b) before the direction expires, or is revoked, under **section 79I**.
- (4) However, the Commissioner may accept an application after the default closing date if satisfied that extenuating circumstances affected the ability of the person

to make the application by that date (but may only accept the application before the direction expires or is revoked).

- (5) In this section, **approved manner** means any manner that—
- (a) is approved by the Commissioner for the purposes of this section; and
 - (b) is specified on an Internet site maintained by or on behalf of the New Zealand Police that is publicly accessible free of charge.

79K How review must be conducted

- (1) The Commissioner must delegate the responsibility for reviewing the Commissioner’s decision to 1 or more persons under section 17 of the Policing Act 2008. 10
- (2) If the original decision was made by a person as a delegate of the Commissioner, the responsibility for reviewing the decision must not be delegated to that person.
- (3) The reviewer must—
- (a) review the decision on the papers; and 15
 - (b) complete that review no later than 5 working days after the date on which the application for review is lodged.
- (4) On completing a review of the decision, the reviewer may—
- (a) affirm the decision; or
 - (b) amend the preservation direction; or 20
 - (c) revoke the preservation direction.
- (5) **Subsections (3) and (4)** cease to apply if, before the review is completed, the preservation direction to which the decision relates is revoked under **section 79I(2)**.

79L Notice, etc, to be given after review is completed 25

- (1) As soon as practicable after the review is completed, the Commissioner must give the applicant—
- (a) written notice of the reviewer’s decision; and
 - (b) if the reviewer’s decision is to amend the preservation direction, an updated version of the direction. 30
- (2) The preservation direction to which the review relates continues in force until the applicant is notified of the reviewer’s decision.
- (3) However, **subsection (2)** does not—
- (a) reduce the period for which the direction otherwise remains in force under **section 79I** if the reviewer’s decision is— 35
 - (i) to affirm the original decision to make the direction; or
 - (ii) to amend the direction; or

- (b) extend the period for which the direction remains in force if it is sooner revoked under **section 79I(2)**.

Invalidity

79M When preservation direction is invalid

- (1) A preservation direction is invalid— 5
 - (a) if, having regard to the information contained in the application for the direction, the conditions specified in **section 79E** for making the direction were not satisfied at the time the direction was made or (if applicable) amended; or
 - (b) if the direction contains a defect, irregularity, omission, or want of form that is likely to mislead anyone executing or affected by the direction as to its purpose or scope. 10
- (2) If a preservation direction is invalid under this section, the following sections do not apply to the direction:
 - (a) section 204 of the Summary Proceedings Act 1957 (proceedings not to be questioned for want of form): 15
 - (b) section 379 of the Criminal Procedure Act 2011 (proceedings not to be questioned for want of form).

Retention, copying, etc, of produced record of pathway information

79N Record of pathway information produced under preservation direction 20

When a record of pathway information is produced in compliance with a preservation direction, an appropriate enforcement officer may do any of the following:

- (a) retain the original record produced if it is relevant to the investigation or proceedings: 25
- (b) take copies of the record:
- (c) if necessary, require the person producing the record—
 - (i) to reproduce, in usable form, the pathway information that is in that record; or
 - (ii) to assist any person nominated by the chief executive or a delegate of the chief executive to reproduce, in usable form, the pathway information that is in that record: 30
- (d) require the person producing the record to provide any related information (for example, the names of any telecommunications service providers involved in transmitting the telecommunication) that is necessary to understand the pathway information. 35

Offences

79O Failing to comply with preservation direction

- (1) A person commits an offence if the person, without reasonable excuse, fails to comply with a preservation direction.
- (2) A person who commits an offence against this section is liable on conviction,—
- (a) if they are an individual, to imprisonment for a term not exceeding 1 year; or
- (b) if they are a body corporate, to a fine not exceeding \$40,000.

5

79P False application for preservation direction

10

- (1) A person commits an offence if they apply for a preservation direction and the application contains any assertion or other statement that they know is false.
- (2) A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 1 year.

79Q Disclosing matters relating to preservation direction

15

Disclosing that direction has been made

- (1) A person who is affected by a preservation direction commits an offence if the person knowingly discloses to any other person that the direction has been made.

Disclosing information contained in relevant documents

20

- (2) A person who is affected by a preservation direction commits an offence if—
- (a) the affected person knowingly discloses to another person any information contained in a document to which the preservation direction relates; and
- (b) the document is in the possession or under the control of the person against whom the direction was made (whether or not they are the affected person making the disclosure); and
- (c) the affected person would not have been able to disclose the information, had a preservation direction not been made in relation to that document (for example, because the document would not have been preserved).

25

30

Penalty

- (3) A person who commits an offence against this section is liable on conviction,—
- (a) if they are an individual, to a term of imprisonment not exceeding 6 months; or
- (b) if they are a body corporate, to a fine not exceeding \$100,000.

35

Exceptions

- (4) A person who is affected by a preservation direction does not commit an offence against this section if the affected person makes the disclosure concerned—
- (a) to an appropriate enforcement officer, in relation to the direction, for the purpose of complying with the direction; or 5
 - (b) to another affected person for the purpose of complying with the direction or obtaining legal advice or legal representation in relation to the direction; or
 - (c) to a lawyer for the purpose of obtaining legal advice or making representations in relation to the direction; or 10
 - (d) to a person acting on behalf of an intelligence and security agency and in accordance with—
 - (i) an intelligence warrant issued under subpart 1 of Part 4 of the Intelligence and Security Act 2017; or 15
 - (ii) an authorisation given under section 78 of that Act; or
 - (e) in accordance with section 122 of the Intelligence and Security Act 2017 or a business records direction issued under section 150 of that Act; or
 - (f) in connection with, or in the course of, proceedings before a court or a tribunal; or 20
 - (g) after the chief executive of the law enforcement agency concerned gives the person against whom the direction is made written notice under **section 79R** in relation to the direction.

Definitions

- (5) A person is **affected by a preservation direction** only if the person is— 25
- (a) the person against whom the direction was made; or
 - (b) an officer, employee, or agent of the person against whom the direction was made.
- (6) A person **discloses** information if the person discloses—
- (a) the substance, meaning, or purport of that information; or 30
 - (b) any part of that information.

79R Chief executive to give written notice for section 79Q(4)(g)

- (1) As soon as practicable after any of the following occurs, the chief executive of the law enforcement agency that employed or engaged the enforcement officer who applied for the preservation direction must give written notice to the person against whom the direction was made: 35

- (a) the law enforcement agency decides to discontinue any investigation into the suspected offence that is the subject of the application for the direction:
 - (b) any criminal proceedings that the law enforcement agency expects to be commenced in relation to the suspected offence have been commenced: 5
 - (c) the chief executive decides for any other reason to give notice under this section in relation to the direction.
- (2) However, the chief executive is not required to give notice if satisfied on reasonable grounds that the disclosure that would be allowed under **section 79Q(4)(g)** because of the notice— 10
- (a) would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
 - (b) would endanger the safety of any person; or
 - (c) would prejudice the supply of information to the law enforcement agency; or 15
 - (d) would prejudice any international relationships of the law enforcement agency; or
 - (e) would prejudice the security or defence of New Zealand.
- (3) The chief executive must—
- (a) keep under review the appropriateness of any decision of the chief executive under **subsection (2)**; and 20
 - (b) give written notice under this section if the Commissioner ceases to be satisfied on reasonable grounds of the matters referred to in **subsection (2)**.

Immunities 25

79S Immunities relating to functions of Commissioner and reviewers

- (1) The Commissioner is immune from civil liability for anything done or omitted to be done by the Commissioner in good faith in determining an application for a preservation direction under this subpart.
- (2) A reviewer is immune from civil liability for anything done or omitted to be done by the reviewer in good faith in conducting a review of the Commissioner's decision to make a preservation direction. 30
- (3) If the Commissioner or a reviewer is immune from civil liability under this section in respect of anything done or omitted to be done, the Crown is also immune from civil liability in respect of the Commissioner's or reviewer's conduct. 35

- (4) If there is any inconsistency between any of **subsections (1) to (3)** and the provisions of any other enactment conferring, regulating, or limiting a privilege or immunity, those subsections prevail.
- (5) In this section, **reviewer** means a person who is responsible (under a delegation under section 17 of the Policing Act 2008) for conducting a review under this subpart of the Commissioner’s decision to make a preservation direction. 5

79T Immunities relating to obtaining or executing preservation directions

- (1) Section 165 applies in relation to a preservation direction as if a reference in that section to a search warrant were a reference to a preservation direction.
- (2) Sections 167 and 168 apply as if a reference in those sections to section 165 included a reference to that section as applied by this section. 10

Effect of court proceedings

79U Effect of court proceedings

Section 180 applies to any proceeding that has been commenced in any court in respect of— 15

- (a) the exercise of a power, or discharge of a duty, conferred or imposed by this subpart; or
- (b) the use for investigative purposes of evidential material that is obtained under a preservation direction and that—
- (i) is a record of pathway information; or 20
- (ii) relates to the location of documents described in the preservation direction.

Service of documents

79V Service of preservation directions and notices

Section 181 applies to the following documents as if a reference in that section to an order included a reference to those documents: 25

- (a) a preservation direction (including its replacement after a review under this subpart):
- (b) any written notice required to be given under this subpart.

Retention of documents 30

79W New Zealand Police to retain applications and related documents

- (1) The New Zealand Police must retain a copy of every written application for a preservation direction, or (in the case of an oral application) the record made by the Commissioner of the application, until,—

**Budapest Convention and Related Matters Legislation
Amendment Bill**

Part 1 cl 18

- (a) in a case where a preservation direction is issued, the date of completion of any proceedings in respect of which the validity of the direction may be in issue; or
 - (b) in any other case, the date that is 2 years after the date on which the application or record was first retained under the control of the New Zealand Police. 5
 - (2) If the applicant is a constable and a preservation direction is issued, the New Zealand Police—
 - (a) must also retain the following documents:
 - (i) the preservation direction: 10
 - (ii) copies of all documents provided by the applicant in support of the application; and
 - (b) must retain those documents, and any documents comprising the copy or record referred to in **subsection (1)**, until the later of the following dates: 15
 - (i) the date of completion of any proceedings in respect of which the validity of the direction may be in issue:
 - (ii) the date of destruction or transfer of the documents under the Public Records Act 2005 or any other enactment or rule of law.
 - (3) **Subsection (2)(b)** applies despite **subsection (1)(a)**. 20
 - (4) The New Zealand Police must retain a copy of every application for a review under this subpart until,—
 - (a) in a case in which the relevant preservation direction is affirmed or amended, the later of the following dates:
 - (i) the date of completion of any proceedings in respect of which the validity of the direction may be in issue: 25
 - (ii) the date that is 2 years after the date on which the application was made; or
 - (b) in any other case, the date that is 2 years after the date on which the application was made. 30
 - (5) Documents required to be retained under this section may be retained in electronic form.
- 79X Documents to be retained by other applicants to whom preservation direction is issued**
- (1) An applicant to whom a preservation direction is issued must retain the preservation direction, a copy of the application (if made in writing), and copies of all documents provided in support of the application until the later of the following dates: 35

- (a) the date of completion of any proceedings in respect of which the validity of the direction may be in issue:
 - (b) the date of destruction or transfer of the preservation direction or other documents under the Public Records Act 2005 or any other enactment or rule of law. 5
- (2) If the applicant is a constable, **section 79W(2) to (4)** applies instead of this section.
- (3) Documents required to be retained under this section may be retained in electronic form.

Annual reporting 10

79Y Annual reporting by Commissioner

- (1) The Commissioner must include in every annual report that the Commissioner prepares for the purposes of section 43 of the Public Finance Act 1989—

Reviews

- (a) the following information about reviews under this subpart that were completed in the reporting period: 15
 - (i) the number in which the reviewer affirmed the relevant direction:
 - (ii) the number in which the reviewer amended the relevant direction:
 - (iii) the number in which the reviewer revoked the relevant direction; and 20
- (b) the number of reviews under this subpart that were not completed because the relevant preservation directions were revoked under **section 79I(2)** in the reporting period; and

Expiry or revocation of preservation directions

- (c) the number of preservation directions that expired during the reporting period without a related application for a production order having been made to obtain any or all of the documents (the **relevant documents**) described in those directions; and 25
- (d) the number of preservation directions that were revoked during the reporting period when a related application for a production order to obtain any or all of the relevant documents was granted; and 30
- (e) the number of preservation directions that were revoked during the reporting period when a related application for a production order to obtain any or all of the relevant documents was refused.

Definitions 35

- (2) In this section, **reporting period**, for an annual report, means the period covered by the report.

- (3) In this section, an application for a production order is related to a preservation direction (and is a **related application**) if the application and preservation direction relate to the same investigation.

19 New Part 3A inserted

After section 88, insert:

5

Part 3A
Preservation directions relating to foreign investigations or proceedings

Subpart 1—Interpretation

88A Interpretation

10

- (1) In this Part,—

Central Authority has the same meaning as in section 2 of the Mutual Assistance in Criminal Matters Act 1992

document has the same meaning as in subpart 2 of Part 3

foreign country has the same meaning as in section 2 of the Mutual Assistance in Criminal Matters Act 1992

15

foreign enforcement authority means a person or an agency that is empowered to perform functions in a foreign country that correspond, wholly or partly, to any of the functions of the New Zealand Police set out in section 9 of the Policing Act 2008

20

law of a foreign country includes the law of a part of, or the law in force in part of, the foreign country

preservation direction means a preservation direction made under this Part

related mutual assistance request, in relation to an application for a preservation direction or for renewal of a preservation direction against a person, means a request under **section 43** of the Mutual Assistance in Criminal Matters Act 1992 for assistance in obtaining documents to which the application relates under a production order against the person

25

serious offence means an offence that is punishable by a term of imprisonment of 2 years or more.

30

- (2) In this Part, a reference to the foreign country in which a foreign enforcement authority is located is a reference to the foreign country in which that authority is empowered to perform functions that correspond, wholly or partly, to any of the functions of the New Zealand Police set out in section 9 of the Policing Act 2008.

35

- (3) In this Part, a related mutual assistance request, in relation to an application for a preservation direction or for renewal of a preservation direction against a person, is **in progress** only if,—
- (a) in the case of an application for a preservation direction, one of the following applies: 5
 - (i) the foreign enforcement authority requesting the preservation direction intends to request or recommend that the Central Authority for the foreign country in which the foreign enforcement authority is located make the related mutual assistance request; or 10
 - (ii) the foreign enforcement authority has requested or recommended that the Central Authority make the related mutual assistance request and the foreign enforcement authority's request or recommendation has not been rejected; or
 - (iii) the Central Authority intends to make or has made the related mutual assistance request; and 15
 - (b) in the case of an application for renewal of a preservation direction,—
 - (i) the foreign enforcement authority requesting the renewal has requested or recommended that the Central Authority for the foreign country in which the foreign enforcement authority is located make the related mutual assistance request and the foreign enforcement authority's request or recommendation has not been rejected; or 20
 - (ii) the Central Authority intends to make or has made the related mutual assistance request; and 25
 - (c) one of the following applies:
 - (i) the Attorney-General has not yet granted or refused the request;
 - (ii) the Attorney-General has granted the request, but a Judge has not yet granted or refused an application made under **section 45** of the Mutual Assistance in Criminal Matters Act 1992 for a production order against the person in respect of those documents. 30
- (4) In this Part, a reference to an **offence of a political character** does not include—
- (a) an offence—
 - (i) that is constituted by conduct of a kind referred to in a multilateral treaty to which New Zealand is a party; and 35
 - (ii) for which parties have an obligation to provide to one another assistance in criminal matters (within the meaning of section 2(1) of the Mutual Assistance in Criminal Matters Act 1992); or

(b)	any offence in relation to which New Zealand has agreed in writing with another country that the offence will not be treated as a political offence for the purposes of the provision of assistance in criminal matters between New Zealand and that country.	
(5)	A term or an expression used in this Part that is not defined in this Part but is defined in subpart 2A of Part 3 has the same meaning as in that subpart.	5
Subpart 2—Applications for preservation directions		
88B Constable to apply for preservation direction requested by foreign enforcement authority		
(1)	A constable must apply to the Commissioner for a preservation direction against a person if a foreign enforcement authority requests the New Zealand Police for a preservation direction against the person and—	10
(a)	one of the following applies:	
(i)	an investigation has commenced in relation to a serious offence against the law of the foreign country in which the foreign enforcement authority is located that it is suspected has been, is being, or will be committed:	15
(ii)	criminal proceedings have commenced in relation to an alleged serious offence against that law; and	
(b)	the documents that the foreign enforcement authority seeks to be preserved are relevant to the investigation or proceedings; and	20
(c)	a related mutual assistance request is in progress.	
(2)	The constable—	
(a)	may require the foreign enforcement authority to supply any information about the matters referred to in subsection (1) ; and	25
(b)	may rely on any information supplied by the foreign enforcement authority about those matters unless the constable knows that the information is false.	
(3)	Subsection (1) is subject to subpart 4 .	
88C Form and content of application		
30		
(1)	An application for a preservation direction—	
(a)	must be in writing; and	
(b)	may be transmitted to the Commissioner electronically.	
(2)	The application must—	
(a)	state the name of the foreign enforcement authority; and	35
(b)	state the name of the person against whom the preservation direction is sought; and	

- (c) specify the serious offence; and
 - (d) set out a summary of the related facts; and
 - (e) describe the documents that the foreign enforcement authority seeks to be preserved; and
 - (f) describe how the documents are relevant to the investigation or proceedings; and 5
 - (g) set out particulars of any location at which the documents are known or believed to be held (including the location of any computer system in which the documents are recorded or stored); and
 - (h) set out the reasons why the foreign enforcement authority seeks to have the documents preserved by way of a preservation direction, including particulars of any concerns about the documents being lost or modified. 10
- (3) The constable—
- (a) may require the foreign enforcement authority to supply any information about the matters referred to in **subsection (2)**; and 15
 - (b) may rely on any information supplied by the foreign enforcement authority about those matters unless the constable knows that the information is false.
- Subpart 3—Preservation directions: making, initial duration, and other matters 20
- 88D Commissioner to make preservation direction**
- (1) On an application for a preservation direction against a person, the Commissioner must make a preservation direction against the person.
 - (2) However, the Commissioner may refuse to grant the application if satisfied that— 25
 - (a) a related mutual assistance request is not in progress; or
 - (b) the foreign enforcement authority’s request for a preservation direction relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character; or 30
 - (c) there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character; or
 - (d) granting the application would prejudice the sovereignty, security, or national interests of New Zealand. 35
 - (3) This section is subject to **subpart 4**.

88E Form and content

- (1) A preservation direction must be in the prescribed form, if any, and must require the person against whom it is made (the **directly affected person**)—
- (a) to preserve, while the direction is in force, any documents described in the direction that are in the possession or under the control of the directly affected person; and 5
 - (b) to the extent that those documents are records of traffic data, to produce to a constable identified in the direction any record of that traffic data that is pathway information and is in the possession or under the control of the directly affected person; and 10
 - (c) if any of the documents described in the direction are not, or are no longer, in the possession or under the control of the directly affected person, to disclose (by the time, if any, specified in the direction and to the best of that person’s knowledge or belief) the location of those documents to a constable identified in the direction. 15
- (2) A preservation direction must state—
- (a) the name of the directly affected person; and
 - (b) the name of the requesting foreign enforcement authority.
- (3) If the preservation direction requires the directly affected person to produce any record of pathway information,— 20
- (a) the preservation direction must also specify the way in which, and a time by which, the directly affected person must produce the record; and
 - (b) that time must not be any earlier than a time on the tenth day after the date on which the direction is given to the directly affected person.
- (4) A preservation direction may describe any documents required to be preserved by reference to a class or category of document. 25
- (5) If a preservation direction is made against a body corporate or an unincorporated body, the direction may specify an individual (whether by name or by reference to a position held in the body) who must comply with the direction as the body’s representative. 30

88F Preservation directions against network operators relating to traffic data, etc

A preservation direction 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. 35

88G Initial duration of preservation direction

- (1) A preservation direction is in force for an initial period, specified in the direction, of up to 150 days.

- (2) This section is subject to **subpart 6**.
- Subpart 4—Consequences if responsible constable believes that requested preservation direction would prejudice investigation, etc
- 88H Foreign enforcement authority to be informed and other consequences of belief** 5
- (1) This section applies if a responsible constable forms the belief, before a requested preservation direction has been served, that serving it—
- (a) would prejudice any investigation by the foreign enforcement authority concerned in relation to the serious offence that is the subject of the request (for example, by threatening the confidentiality of the investigation or because it would risk the loss or modification of the documents); or 10
- (b) would be unlikely to result in the preservation of the documents that the foreign enforcement authority seeks to be preserved.
- (2) If the responsible constable forms the belief before the application is made,— 15
- (a) the constable must inform the foreign enforcement authority of that belief as soon as practicable; and
- (b) the application may be made only if the foreign enforcement authority confirms its request.
- (3) If the responsible constable forms the belief after the application is made and before the Commissioner determines it,— 20
- (a) the constable must inform the foreign enforcement authority and the Commissioner of that belief as soon as practicable; and
- (b) the Commissioner may grant the application only if the foreign enforcement authority confirms its request. 25
- (4) If the responsible constable forms the belief after the Commissioner grants the application but before the direction is served,—
- (a) the constable must inform the foreign enforcement authority and the Commissioner of that belief as soon as practicable; and
- (b) the direction may be served only if the foreign enforcement authority confirms its request; and 30
- (c) the direction is to be treated as not having been made if the foreign enforcement authority withdraws the request.
- (5) A responsible constable for a requested preservation direction does not have any duty to determine whether they believe the matters referred to in **subsection (1)**. 35
- (6) In this section, **responsible constable**, in relation to a preservation direction requested by a foreign enforcement authority, means the constable who is

responsible for informing the foreign enforcement authority of matters relating to the request.

Subpart 5—Renewal of preservation directions

88I Application for renewal

- (1) A constable must apply to the Commissioner for a preservation direction against a person to be renewed if— 5
- (a) a foreign enforcement authority—
 - (i) requests the New Zealand Police to renew the direction; and
 - (ii) makes the request before the direction expires; and
 - (b) a related mutual assistance request is in progress; and 10
 - (c) the direction has not been renewed before, or has been renewed fewer than 4 times.
- (2) The following apply in relation to an application for renewal:
- (a) the application must be in writing and may be transmitted electronically:
 - (b) the application may relate to all of the documents to which the preservation direction currently applies or to fewer, or a narrower class, of those documents: 15
 - (c) the application must identify any material changes to the matters referred to in **sections 88B(1) and 88C(2)** since the preservation direction was made or last renewed: 20
 - (d) the constable—
 - (i) may require the foreign enforcement authority to supply information about the material changes; and
 - (ii) may rely on any information supplied by the foreign enforcement authority about those changes unless the constable knows that the information is false. 25

88J Granting of application

- (1) On an application for renewal of a preservation direction, the Commissioner must grant the application.
- (2) However, the Commissioner— 30
- (a) must refuse to grant the application if the preservation direction has already been renewed 4 times; and
 - (b) may refuse to grant the application if satisfied that—
 - (i) a related mutual assistance request is not or is no longer in progress; or
 - (ii) the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in 35

which it is alleged to have been committed or was committed, an offence of a political character; or	
(iii) there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character; or	5
(iv) granting the application would prejudice the sovereignty, security, or national interests of New Zealand.	
88K Period for which preservation direction continues in force	
(1) The preservation direction continues in force until the Commissioner determines the application for renewal.	10
(2) If the Commissioner grants the application, the preservation direction continues in force until the end of the period that the Commissioner determines, subject to subpart 6 .	
(3) That period must not exceed 180 days after the day on which the direction would have expired but for subsection (1) .	15
88L Updated version of preservation direction must be issued	
If the Commissioner grants the application for renewal, the Commissioner must issue an updated version of the preservation direction that—	
(a) states that it is renewed; and	
(b) specifies the period for which the direction remains in force.	20
Subpart 6—Continuation and revocation: effect of requests and applications under Mutual Assistance in Criminal Matters Act 1992	
88M Preservation direction to continue: request for assistance by production order	
(1) This subpart applies if—	25
(a) a request is made to the Attorney-General under section 43 of the Mutual Assistance in Criminal Matters Act 1992 for assistance in obtaining, under a production order against a person, all or any of the documents described in a preservation direction against the person; and	
(b) the request is made before the preservation direction would otherwise expire under section 88G or 88K ; and	30
(c) the preservation direction and the request for the production order relate to the same investigation or proceedings.	
(2) The direction continues in force in relation to all of the documents until it is revoked or partially revoked under section 88N .	35

88N Whole or partial revocation of preservation direction

- (1) The preservation direction is revoked in relation to all of the documents described in the direction when either of the following occurs:
- (a) the Attorney-General refuses a request under **section 43** of the Mutual Assistance in Criminal Matters Act 1992 by the foreign country concerned for assistance in obtaining those documents under a production order against the person: 5
 - (b) a Judge determines an application under **section 45** of that Act for a production order against the person relating to all or any of those documents. 10
- (2) The preservation direction is revoked in relation to particular documents or classes of documents (rather than all of the documents) described in the direction if the Attorney-General refuses a request as referred to in **subsection (1)(a)**, but that refusal is limited to those particular documents or classes of documents. 15
- (3) The Commissioner must give written notice to the person against whom the preservation direction is made that the direction is revoked or partially revoked, as the case may be.

Guidance note

Generally, written notice would also be required under **section 88W** as soon as practicable after a preservation direction is partially revoked under this section. 20

- (4) However, the Commissioner is not required to give the notice in a case in which **subsection (1)(b)** applies if the Judge grants the application for the production order.

Subpart 7—Reviews 25

88O Right of review

- (1) A person against whom a preservation direction is made may apply to the Commissioner, in the approved manner, for a review of either of the following decisions of the Commissioner:
- (a) a decision to make the direction: 30
 - (b) a decision to renew the direction.
- (2) An application must state—
- (a) the decision that the applicant wishes to be reviewed; and
 - (b) why the applicant thinks the decision should be reviewed; and
 - (c) the review outcome that the applicant seeks. 35
- (3) An application must be made—
- (a) no later than the default closing date, which is 30 working days after the date on which—

(5) **Subsections (3) and (4)** cease to apply if, before the review is completed, the preservation direction to which the decision relates is revoked under **subpart 6**.

88Q Notice, etc, to be given after review is completed

- (1) As soon as practicable after the review is completed, the Commissioner must give the applicant— 5
- (a) written notice of the reviewer’s decision; and
 - (b) if the reviewer’s decision is to amend the preservation direction or renewed direction, an updated version of the direction.

Guidance note

After a reviewer makes certain decisions, written notice would generally also be required under **section 88W**. 10

(2) The preservation direction to which the review relates continues in force until the applicant is notified of the reviewer’s decision.

- (3) However, **subsection (2)** does not— 15
- (a) reduce the period for which the direction otherwise remains in force under this Part if the reviewer’s decision is—
 - (i) to affirm the original decision to make or renew the direction; or
 - (ii) to amend the direction or renewed direction; or

Guidance note

See **sections 88G, 88K(2), and 88M**. 20

(b) extend the period for which the direction remains in force if it is sooner revoked under **section 88N**.

Subpart 8—Invalidity, offences, and immunities, etc

Invalidity

88R When preservation direction is invalid

- (1) A preservation direction is invalid if the direction contains a defect, irregularity, omission, or want of form that is likely to mislead anyone executing or affected by the preservation direction as to its purpose or scope.
- (2) A preservation direction is invalid on its purported renewal if the direction, as purportedly renewed, contains a defect, irregularity, omission, or want of form that is likely to mislead anyone executing or affected by the preservation direction as to its purpose or scope. 30
- (3) If a preservation direction is invalid under this section, the following sections do not apply to the direction: 35

- (a) section 204 of the Summary Proceedings Act 1957 (proceedings not to be questioned for want of form):
- (b) section 379 of the Criminal Procedure Act 2011 (proceedings not be questioned for want of form).

Copying, etc, of produced record of pathway information 5

88S Pathway information produced under preservation direction

When a record of pathway information is produced in compliance with a preservation direction, a constable may do any of the following:

- (a) take copies of the record:
- (b) if necessary, require the person producing the record— 10
 - (i) to reproduce, in usable form, the pathway information that is in that record; or
 - (ii) to assist any person nominated by the Commissioner or a delegate of the Commissioner to reproduce, in usable form, the pathway information that is in that record: 15
- (c) require the person producing the record to provide any related information (for example, the names of any telecommunications service providers involved in transmitting the telecommunication) that is necessary to understand the pathway information:
- (d) send to the foreign enforcement authority that requested the preservation direction— 20
 - (i) the record; or
 - (ii) copies of the record; or
 - (iii) the pathway information in a reproduced and usable form; or
 - (iv) the related information (if any) that is necessary to understand the pathway information. 25

Offences relating to disclosure

88T Definitions for sections 88U to 88W

In **sections 88U to 88W**,—

- (a) a person is **affected by a preservation direction** only if the person is— 30
 - (i) the person against whom the direction was made; or
 - (ii) an officer, employee, or agent of the person against whom the direction was made; and
- (b) a person **discloses** information if the person discloses—
 - (i) the substance, meaning, or purport of that information; or 35
 - (ii) any part of that information.

88U Offences

Disclosing that direction has been made

- (1) A person who is affected by a preservation direction commits an offence if the person knowingly discloses to any other person that the direction has been made. 5

Disclosing information contained in relevant documents

- (2) A person who is affected by a preservation direction commits an offence if—
- (a) the affected person knowingly discloses to another person any information contained in a document to which the preservation direction relates; and 10
 - (b) the document is in the possession or under the control of the person against whom the direction was made (whether or not they are the affected person making the disclosure); and
 - (c) the affected person would not have been able to disclose the information, had a preservation direction not been made in relation to that document (for example, because the document would not have been preserved). 15

Penalty

- (3) A person who commits an offence against this section is liable on conviction,—
- (a) if they are an individual, to a term of imprisonment not exceeding 6 months; or 20
 - (b) if they are a body corporate, to a fine not exceeding \$100,000.

Exceptions

- (4) A person who is affected by a preservation direction does not commit an offence against this section if the affected person makes the disclosure concerned— 25
- (a) to a constable for the purpose of complying with the direction; or
 - (b) to another affected person for the purpose of complying with the direction or obtaining legal advice or legal representation in relation to the direction; or 30
 - (c) to a lawyer for the purpose of obtaining legal advice or making representations in relation to the direction; or
 - (d) to a person acting on behalf of an intelligence and security agency and in accordance with—
 - (i) an intelligence warrant issued under subpart 1 of Part 4 of the Intelligence and Security Act 2017; or 35
 - (ii) an authorisation given under section 78 of that Act; or - (e) in accordance with section 122 of the Intelligence and Security Act 2017 or a business records direction issued under section 150 of that Act; or

- (f) in connection with, or in the course of, proceedings before a court or a tribunal; or
 - (g) if this section has ceased to apply to the affected person under **section 88V**.
- (5) A person who is affected by a preservation direction does not commit an offence against **subsection (2)**, in relation to any information contained in a document, if—
- (a) the affected person makes the disclosure concerned after the Commissioner gives written notice under **section 88W** in relation to the direction; and
 - (b) the Commissioner has given the notice because the direction has ceased to apply to the document or a class of documents to which the document belongs.
- 88V When section 88U ceases to apply to affected person**
- (1) **Section 88U** ceases to apply to a person who is affected by a preservation direction when the direction expires or is revoked.
-
- Guidance note**
See **sections 88G and 88K, subpart 6, and section 88Q.**
-
- (2) However, that section continues to apply to the affected person if the Commissioner gives written notice, before the date on which the direction expires or is revoked, to the person against whom the direction is made.
- (3) If the Commissioner gives notice under **subsection (2)**, **section 88U** continues to apply to the affected person until the notice is revoked.
- (4) The Commissioner may give notice under **subsection (2)** to a person against whom a preservation direction is made only if the Commissioner is satisfied on reasonable grounds that the disclosure that would be allowed if **section 88U** were to cease to apply—
- (a) would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
 - (b) would endanger the safety of any person; or
 - (c) would prejudice the supply of information to the law enforcement agency; or
 - (d) would prejudice any international relationships of the law enforcement agency; or
 - (e) would prejudice the security or defence of New Zealand.
- (5) The Commissioner must—
- (a) keep under review the appropriateness of a notice given under **subsection (2)**; and

- (b) revoke the notice, and give written notice of that revocation to the person against whom the direction is made, if the Commissioner ceases to be satisfied on reasonable grounds of the matters referred to in **subsection (4)**.

88W Notice for section 88U(5): when section 88U(2) partially lifted 5

- (1) This section applies if a preservation direction ceases to apply in relation to particular documents or classes of documents (rather than all of the documents) described in the direction because the direction—
 - (a) is partially revoked under **section 88N**; or
 - (b) is amended under **section 88P(4)(a)(ii)** on completion of a review under **section 88P**. 10
- (2) As soon as practicable after the preservation direction ceases to apply in relation to particular documents or classes of documents, the Commissioner must give written notice for the purposes of **section 88U(5)** to the person against whom the direction is made. 15
- (3) However, the Commissioner is not required to give any notice under this section if satisfied on reasonable grounds that the disclosure that would be allowed because of the notice—
 - (a) would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or 20
 - (b) would endanger the safety of any person; or
 - (c) would prejudice the supply of information to the law enforcement agency; or
 - (d) would prejudice any international relationships of the law enforcement agency; or 25
 - (e) would prejudice the security or defence of New Zealand.
- (4) The Commissioner must—
 - (a) keep under review the appropriateness of any decision of the Commissioner under **subsection (3)**; and
 - (b) give written notice for the purposes of **section 88U(5)** to the person against whom the preservation direction is made if the Commissioner ceases to be satisfied on reasonable grounds of the matters referred to in **subsection (3)**. 30

Other offences

88X Failing to comply with preservation direction 35

- (1) A person commits an offence if the person, without reasonable excuse, fails to comply with a preservation direction.

- (2) A person who commits an offence against this section is liable on conviction,—
- (a) if they are an individual, to imprisonment for a term not exceeding 1 year; or
 - (b) if they are a body corporate, to a fine not exceeding \$40,000.

5

88Y False application for preservation direction or renewal

- (1) A person commits an offence if—
- (a) they apply for a preservation direction or for renewal of a preservation direction; and
 - (b) the application contains any assertion or other statement that they know is false.
- (2) A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 1 year.

10

Immunities

88Z Immunities relating to functions of Commissioner and reviewers

15

- (1) The Commissioner is immune from civil liability for anything done or omitted to be done by the Commissioner in good faith in determining an application for a preservation direction, or the renewal of a preservation direction, under this Part.
- (2) A reviewer is immune from civil liability for anything done or omitted to be done by the reviewer in good faith in conducting a review of the Commissioner's decision to make or renew a preservation direction.
- (3) If the Commissioner or a reviewer is immune from civil liability under this section in respect of anything done or omitted to be done, the Crown is also immune from civil liability in respect of the Commissioner's or reviewer's conduct.
- (4) If there is any inconsistency between any of **subsections (1) to (3)** and the provisions of any other enactment conferring, regulating, or limiting a privilege or immunity, those subsections prevail.
- (5) In this section, **reviewer** means a person who is responsible (under a delegation under section 17 of the Policing Act 2008) for conducting a review under **subpart 7** of the Commissioner's decision to make a preservation direction.

20

25

30

88ZA Immunities relating to obtaining, renewing, or executing preservation direction

- (1) Section 165 applies in relation to a preservation direction as if—
- (a) a reference in that section to obtaining a search warrant were a reference to obtaining—

35

- (i) a preservation direction; or
 - (ii) the renewal of a preservation direction; and
 - (b) a reference in that section to executing a search warrant were a reference to executing the preservation direction.
- (2) Sections 167 and 168 apply as if a reference in those sections to section 165 included a reference to that section as applied by this section. 5

Effect of court proceedings

88ZB Effect of court proceedings

Section 180 applies to any proceeding that has been commenced in any court in respect of— 10

- (a) the exercise of a power, or discharge of a duty, imposed by this Part; or
- (b) the use for investigative purposes of evidential material that is obtained under a preservation direction and that—
 - (i) is a record of pathway information; or
 - (ii) relates to the location of documents described in the preservation direction. 15

Service of documents

88ZC Service of preservation directions, notices, etc

Section 181 applies in relation to the following documents as if a reference in that section to an order included a reference to those documents: 20

- (a) a preservation direction:
- (b) a written notice that is required to be given under this Part:
- (c) an updated version of a preservation direction that is required to be given under this Part.

Retention of documents 25

88ZD New Zealand Police to retain applications and related documents

- (1) The New Zealand Police must retain a copy of every application under this Part, and copies of the documents related to the application, until,—
- (a) in a case where an application is granted, the later of the following dates:
 - (i) the date of completion of any proceedings in respect of which the validity of the preservation direction or its renewal may be in issue: 30
 - (ii) the date of destruction or transfer of the preservation direction or other documents under the Public Records Act 2005 or any other enactment or rule of law; or 35

- (b) in any other case, the date that is 2 years after the date on which the application and other documents were first retained under the control of the New Zealand Police.
- (2) The New Zealand Police must retain a copy of every application for a review under this Part until,— 5
- (a) in a case in which the relevant preservation direction is affirmed or amended, the later of the following dates:
- (i) the date of completion of any proceedings in respect of which the validity of the direction may be in issue: 10
- (ii) the date that is 2 years after the application is made; or
- (b) in any other case, the date that is 2 years after the application is made.
- (3) Documents required to be retained under this section may be retained in electronic form.
- (4) In this section,— 15
- application under this Part** means—
- (a) an application for a preservation direction; or
- (b) an application to renew a preservation direction
- documents related to an application** means—
- (a) any documents provided by the foreign enforcement authority concerned in connection with the related request; and 20
- (b) any documents provided by the applicant in support of an application for a preservation direction; and
- (c) in the case of an application for a preservation direction that is granted, the direction; and
- (d) in the case of an application for the renewal of a preservation direction that is granted, the updated version of the direction. 25

Annual reporting

88ZE Annual reporting by Commissioner

- (1) The Commissioner must include in every annual report that the Commissioner prepares for the purposes of section 43 of the Public Finance Act 1989— 30
- Review of decision to make preservation direction*
- (a) the following information about reviews of a decision to make a preservation direction that were completed in the reporting period:
- (i) the number in which the reviewer affirmed the relevant direction:
- (ii) the number in which the reviewer amended the relevant direction: 35
- (iii) the number in which the reviewer revoked the relevant direction; and

- (3) In this section, an application for a production order is related to a preservation direction (and is a **related application**) if the application and preservation direction relate to the same investigation or proceedings.

20 Section 162 amended (Other copies and generated material may be retained)

5

In section 162(2), after “63”, insert “, **64A**,”.

21 New sections 179A and 179B inserted

After section 179, insert:

179A Disclosing that surveillance device warrant has been issued

- (1) A person who has been called on to assist an enforcement officer to carry out any of the activities authorised by a surveillance device warrant commits an offence if the person knowingly discloses to another person that the warrant has been issued. 10
- (2) The person does not commit an offence if they make the disclosure—
- (a) in connection with, or in the course of, providing the assistance concerned; or 15
 - (b) to the enforcement officer or any other enforcement officer who is employed or engaged by the same law enforcement agency as that enforcement officer; or
 - (c) to a lawyer for the purpose of obtaining legal advice in relation to the warrant; or 20
 - (d) in connection with, or in the course of, proceedings before a court or a tribunal; or
 - (e) after the chief executive of the law enforcement agency concerned grants an application made by the person under **section 179B** in relation to the surveillance device warrant. 25
- (3) A person who commits an offence against this section is liable on conviction,—
- (a) if they are an individual, to a term of imprisonment not exceeding 6 months; or 30
 - (b) if they are a body corporate, to a fine not exceeding \$100,000.

Guidance note

Section 179 also applies to the assistant.

179B Application for prohibition on disclosure to be lifted

- (1) A person who has been called on to assist an enforcement officer to carry out any of the activities authorised by a surveillance device warrant may apply, to the chief executive that employed or engaged the enforcement officer, for the 35

- chief executive to lift any prohibition in **section 179A** on disclosing that the warrant has been issued.
- (2) The chief executive must grant the application and give written notice to the person that the application is granted if—
- (a) the law enforcement agency has decided to discontinue any investigation into the suspected offence that is the subject of the application for the warrant; or 5
 - (b) any criminal proceedings that the law enforcement agency expected to be commenced in relation to the suspected offence have been commenced; or 10
 - (c) the law enforcement agency has become aware that the subject of the surveillance is aware that they are the subject of the surveillance (for, example, because the subject is notified in accordance with an order made under section 61(1)(c)); or
 - (d) the chief executive decides for any other reason to give notice under this section in relation to the direction. 15
- (3) However, the chief executive is not required to grant an application under this section if satisfied on reasonable grounds that disclosure that the warrant has been issued (other than as allowed by **section 179A(2)(a), (b), (c), or (d)**)—
- (a) would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or 20
 - (b) would endanger the safety of any person; or
 - (c) would prejudice the supply of information to the law enforcement agency; or
 - (d) would prejudice any international relationships of the law enforcement agency; or 25
 - (e) would prejudice the security or defence of New Zealand.

22 Section 342 amended (Regulations)

- (1) In section 342(1)(a), after “production order,”, insert “preservation direction,”.
- (2) In section 342(2), replace “or order” with “, direction, or order” in each place. 30
- (3) After section 342(2A), insert:
- (2B) In this section, **preservation direction** means a preservation direction made under **subpart 2A of Part 3** or **Part 3A**.

23 Cross-heading above section 343 replaced

Replace the cross-heading above section 343 with: 35

Transitional provisions relating to this Act as enacted

24 New Schedule 1 inserted

Insert the **Schedule 1** set out in **Schedule 1** of this Act as the first schedule to appear after the last section of the principal Act.

25 Schedule amended

(1) In the Schedule heading, replace “**Schedule**” with “**Schedule 2**”. 5

(2) In the Schedule, item relating to section 104(1) of the Criminal Proceeds (Recovery) Act 2009, column 3, replace “this Act or to any proceedings under this Act” with “the Criminal Proceeds (Recovery) Act 2009 or to any proceedings under that Act”.

(3) In the Schedule, replace the item relating to the Mutual Assistance in Criminal Matters Act 1992 with: 10

Mutual Assistance in Criminal Matters Act 1992	44	Constable may obtain and execute warrant to search for and seize any evidential material in respect of offence against foreign law that has been, may have been, or may be committed	All (except subpart 6)
--	-----------	--	------------------------

26 Consequential amendments related to renumbering of Schedule

Amend the principal Act as set out in **Part 1 of Schedule 2**.

Subpart 2—Amendments to Mutual Assistance in Criminal Matters Act 1992 15

27 Principal Act

This subpart amends the Mutual Assistance in Criminal Matters Act 1992.

28 Section 2 amended (Interpretation)

(1) In section 2(1), insert in their appropriate alphabetical order: 20

constable has the same meaning as in section 4 of the Policing Act 2008

evidential material has the same meaning as in section 3(1) of the Search and Surveillance Act 2012

highly restricted surveillance means—

(a) surveillance by means of an interception device; or 25

(b) trespass surveillance other than by means of a tracking device

interception device has the same meaning as in section 3(1) of the Search and Surveillance Act 2012

surveillance device has the same meaning as in section 3(1) of the Search and Surveillance Act 2012

tracking device has the same meaning as in section 3(1) of the Search and Surveillance Act 2012 30

trespass surveillance has the same meaning as in section 3(1) of the Search and Surveillance Act 2012

visual surveillance device has the same meaning as in section 3(1) of the Search and Surveillance Act 2012.

- (2) In section 2(1), repeal the definitions of **examination order** and **production order**. 5

29 Section 20 and cross-heading replaced

Replace section 20 and the cross-heading above section 20 with:

Assistance in obtaining things

20 Assistance in obtaining thing 10

- (1) The Attorney-General may request a foreign country to assist in obtaining or accessing a thing, by search and seizure if necessary, if satisfied that there are reasonable grounds to believe that the thing—
- (a) is in the foreign country or, if it is an intangible thing (for example, computer data or a computer program), is under the control of a person who is present in the foreign country; and 15
 - (b) is relevant to a criminal matter in respect of an offence against the law of New Zealand.
- (2) The Attorney-General may request assistance in obtaining the thing by search and seizure only if the offence is punishable by imprisonment for a term of 2 years or more. 20

Assistance relating to surveillance devices

20A Assistance in obtaining information by means of surveillance device

- (1) The Attorney-General may request a foreign country to assist in obtaining information by means of a surveillance device if satisfied that there are reasonable grounds to believe that— 25
- (a) at least 1 of the following applies:
 - (i) a place, vehicle, or other thing that would be the object of the surveillance is or will be in the foreign country;
 - (ii) a person who would be the object of the surveillance is or will be present in the foreign country; and 30
 - (b) the information is or will be relevant to a criminal matter in respect of an offence against the law of New Zealand that is punishable by imprisonment for a term of 2 years or more.
- (2) If satisfied that there are reasonable grounds to believe that the foreign country would be likely to collect any of the information by means of highly restricted 35

	surveillance (if it were to grant the request), the Attorney-General may make the request only if the offence is an eligible offence for that surveillance.	
(3)	In this section, eligible offence , for highly restricted surveillance, means—	
(a)	an offence that is punishable by imprisonment for a term of 7 years or more; or	5
(b)	an offence against any of the following provisions of the Arms Act 1983:	
(i)	for trespass surveillance other than by means of a tracking device, section 16(4), 16A, 42A, 42B, 43, 43AA, 44, 44AA, 44A, 45, 50, 50AA, 50A, 50B, 50C, 50CA, 50D, 51, 53A(2), 54, 55, or 55A:	10
(ii)	for surveillance by means of an interception device, section 16(4), 16A, 42A, 42B, 44, 44A, 45, 50, 50A, 50B, 50C, 50D, 51, 53A(2), 54, 55, or 55A; or	
(c)	an offence against section 25, 26, or 70 of the Psychoactive Substances Act 2013; or	15
(d)	an offence against section 308A of the Crimes Act 1961.	
30	Cross-heading above section 22 replaced	
	Replace the cross-heading above section 22 with:	
	<i>Requests to issue warrants and orders similar to those under Criminal Proceeds (Recovery) Act 2009</i>	20
31	Cross-heading above section 24 replaced	
	Replace the cross-heading above section 24 with:	
	Subpart 1—Preliminary provisions	
32	Cross-heading above section 30 replaced	
	Replace the cross-heading above section 30 with:	25
	Subpart 2—Assistance in locating or identifying persons	
33	Cross-heading above section 31 replaced	
	Replace the cross-heading above section 31 with:	
	Subpart 3—Assistance in obtaining evidence in New Zealand	
34	Cross-heading above section 37 replaced	30
	Replace the cross-heading above section 37 with:	
	Subpart 4—Assistance in arranging attendance of person in foreign country	

35 Cross-heading above section 43 replaced

Replace the cross-heading above section 43 with:

Subpart 5—Requests for search warrants and production orders

Interpretation

42A Interpretation

5

(1) In this subpart,—

document has the same meaning as in **section 70 of the Search and Surveillance Act 2012**

notifiable person has the same meaning as in **section 49A**.

(2) In this subpart, a reference to a **thing** that is produced under a production order is a reference to a document that is produced under a production order. 10

36 Sections 43 and 44 replaced

Replace sections 43 and 44 with:

Requests

43 Assistance in obtaining thing

15

(1) A foreign country may request the Attorney-General to assist in obtaining—

- (a) a thing under a search warrant; or
- (b) a document under a production order.

(2) The Attorney-General may authorise the New Zealand Police to apply to a Judge for a search warrant or a production order under this subpart if the Attorney-General is satisfied— 20

- (a) that the request relates to a criminal matter in respect of an offence against the law of that foreign country that is punishable by imprisonment for a term of 2 years or more; and
- (b) that there are reasonable grounds to believe that the thing or document is relevant to the criminal matter; and 25
- (c) that there are reasonable grounds to believe that,—

- (i) for a request for assistance in obtaining a thing under a search warrant, the thing is in New Zealand; or

- (ii) for a request for assistance in obtaining a document under a production order, the document is in the possession or under the control of a person who could be served and comply with the order in New Zealand if it were made (for example, because they are an individual living in New Zealand or a company that is registered in New Zealand). 30 35

Search warrants

44 Applications, issue, etc

- (1) If the Attorney-General authorises the New Zealand Police to apply for a search warrant, a constable may apply for a search warrant in the manner provided in subpart 3 of Part 4 of the Search and Surveillance Act 2012. 5
- (2) On an application by a constable to a Judge, the Judge may issue a search warrant in relation to a place, vehicle, or other thing if satisfied that there are reasonable grounds—
- (a) to suspect that an offence against the law of a foreign country punishable by imprisonment for a term of 2 years or more has been or will be committed; and 10
- (b) to believe that the search will find evidential material in respect of the offence in or on the place, vehicle, or other thing.
- (3) Part 4 of the Search and Surveillance Act 2012, except for subpart 6 of that Part, applies in relation to an application made, and a search warrant issued, under this section. 15
- (4) For that purpose, a reference in section 101 of that Act (retention of documents) to the District Court is to be read as if it were a reference to the High Court.

Production orders 20

45 General provisions: applications and making

- (1) If the Attorney-General authorises the New Zealand Police to apply for a production order, a constable may apply to a Judge for a production order.
- (2) On an application by a constable, a Judge may make a production order against a person if satisfied that there are reasonable grounds— 25
- (a) to suspect that an offence against the law of a foreign country punishable by imprisonment for a term of 2 years or more has been or will be committed; and
- (b) to believe that the document sought by the proposed order—
- (i) is evidential material in respect of the offence; and 30
- (ii) is in the possession or under the control of the person, or will come into the possession or under the control of the person while the order is in force.

46 Applicable provisions of Search and Surveillance Act 2012

Provisions about applications for production orders 35

- (1) Section 71(2) of the Search and Surveillance Act 2012 applies to an application made under **section 45**.

- (2) The following provisions of the Search and Surveillance Act 2012 apply in relation to an application made under **section 45**:
- (a) section 98(2) (requirements for further information):
 - (b) section 99 (verification of an application):
 - (c) section 100 (mode of an application): 5
 - (d) section 101 (retention of documents about applications).
- (3) Those provisions apply as if—
- (a) a reference in those provisions to an application for a search warrant, or to a search warrant, included (respectively) a reference to an application, or to a production order, made under **section 45**; and 10
 - (b) a reference in those provisions to the District Court were a reference to the High Court.
- Provisions about production orders*
- (4) The following provisions of the Search and Surveillance Act 2012 apply in relation to a production order made under **section 45**: 15
- (a) section 75 (form and content of a production order):
 - (b) section 76 (duration of a production order):
 - (c) section 78 (documents produced under a production order):
 - (d) section 79 (requiring a copy of a retained document to be given).
- (5) Section 105 of the Search and Surveillance Act 2012 (transmission of a search warrant) applies in relation to a production order made under **section 45** as if a reference in section 105 of that Act to a search warrant included a reference to that production order. 20
- (6) Section 107 of the Search and Surveillance Act 2012 (when a search warrant is invalid) applies to a production order made under **section 45**— 25
- (a) as if a reference in section 107 of that Act to a search warrant were a reference to that production order; and
 - (b) as if a reference in section 107 of that Act to the grounds or conditions for lawful issue of a warrant were a reference to the matter that the Judge must be satisfied of under **section 45(2)**. 30
- (7) The following provisions of Part 4 of the Search and Surveillance Act 2012 apply in relation to a production order made under **section 45**:
- (a) subpart 5 (privilege and confidentiality):
 - (b) subpart 7 (immunities):
 - (c) subpart 9 (offences): 35
 - (d) subpart 10 (miscellaneous provisions dealing with the effect of court proceedings and with service of orders and notices).

37 Sections 49 and 50 replaced

Replace sections 49 and 50 with:

Custody and disposal of things seized or produced

49 General provisions

- (1) Any thing seized or produced under a search warrant issued or a production order made under this subpart must— 5
- (a) be delivered into the custody of the Commissioner; and
 - (b) be kept in the custody of the Commissioner until otherwise dealt with in accordance with this section.
- (2) The thing must be dealt with in accordance with any written direction that the Attorney-General gives to the Commissioner (subject to **section 49A**). 10
- (3) The Commissioner must arrange for the thing to be returned to the appropriate person, as soon as practicable after the prescribed period for the thing ends, if the Attorney-General has not given a direction under this section, or a copy of a **section 49A** notice, relating to the thing to the Commissioner before the end of that prescribed period. 15
- (4) In this section,—
- appropriate person**, for the return of a thing, means the person who—
- (a) possessed the thing immediately before it was seized under the search warrant; or 20
 - (b) produced it under the production order
- prescribed period**, in relation to a thing, means the period of 1 month starting on the day on which the thing is seized or produced
- section 49A notice** means a written notice given by the Attorney-General under **section 49A**. 25

49A Sending thing out of New Zealand

- (1) The Attorney-General may direct the Commissioner under **section 49** to arrange for the thing—
- (a) to be transferred to the custody of the Attorney-General, or of any other person specified in the direction, for sending to an appropriate authority of a foreign country; or 30
 - (b) to be sent to an appropriate authority of a foreign country.
- (2) However, the thing may be sent out of New Zealand only if—
- (a) one of the following applies: 35
 - (i) the Attorney-General has given written notice to each notifiable person of the Attorney-General's intention to give a direction that

- would result in the thing being sent out of New Zealand and has provided a copy of that notice to the Commissioner:
- (ii) the Attorney-General is satisfied that the notifiable person is deceased, or that all reasonable steps have been taken to identify or contact the person but the person cannot be identified or contacted: 5
 - (iii) a Judge has dispensed with the obligation to give written notice to the notifiable person under **section 49B**; and
- (b) any proceeding in New Zealand that is commenced by a notifiable person and relates to the search warrant, production order, or the proposed direction has been finally disposed of; and 10
 - (c) the foreign country has given undertakings about any matter that the Attorney-General considers appropriate.
- (3) **Subsection (2)(b)** does not prevent the thing from being sent out of New Zealand with the agreement of the notifiable person referred to in that provision. 15
- (4) A notice that is required to be given under this section to a notifiable person must be given at least 10 working days before a direction of a kind referred to in **subsection (1)** is given.
- (5) The notice must inform the notifiable person of each of the following: 20
- (a) the terms of the proposed direction (but only to the extent that it relates to the thing):
 - (b) the date on which the Attorney-General proposes to give the direction:
 - (c) that the notice is given for the purposes of **subsection (2)(a)**:
 - (d) the effect of **subsections (2) and (3)**: 25
 - (e) any specific or general arrangements that may apply to the return, disposal, destruction, or forfeiture of the thing:
 - (f) a physical or an electronic address that the notifiable person may use for inquiries or other communications about the notice and proposed direction. 30
- (6) Section 181 of the Search and Surveillance Act 2012 applies to the giving of a notice for the purposes of this section in the same way as it applies to the giving of a notice for the purposes of that Act.
- (7) In this section, **notifiable person**, in relation to a thing, means— 35
- (a) any person who has been identified in connection with the request under **section 43** as someone who it is suspected has committed or will commit the offence concerned; or
 - (b) in the case of a thing that was seized under a search warrant,—

- (i) the person who appears to the Attorney-General to be the owner of the thing; or
- (ii) the person who possessed the thing immediately before it was seized under a search warrant; or
- (iii) the occupier of the place, or the person in charge of the vehicle or other thing, from which the seizure took place; or 5
- (c) in the case of a thing that was produced under a production order and contains information about an identifiable individual, that individual (but only if the central purpose of the production order was to obtain information about that individual); or 10
- (d) any other person who the Attorney-General is satisfied there are reasonable grounds to suspect has committed or will commit the offence concerned.

49B Dispensing with obligation to give notice

Application

- (1) The Attorney-General may authorise the New Zealand Police to apply for a dispensation from the Attorney-General's obligation to give notice under **section 49A** of the Attorney-General's intention to direct that a thing seized under a search warrant or produced under a production order be sent out of New Zealand. 15
- (2) If the Attorney-General authorises the New Zealand Police to apply for a dispensation from the Attorney-General's obligation to give notice under that section relating to a thing, a constable may apply to a Judge for a dispensation from that obligation to give notice relating to the thing. 20
- (3) A constable may make the application after the application for the search warrant or production order is made but before the Attorney-General makes a direction of a kind referred to in **section 49A(1)**. 25
- (4) A constable may also make the application at the same time as applying for—
 - (a) a search warrant that would authorise the seizure of the thing; or
 - (b) a production order that would require a person to produce the thing. 30

Test for dispensation

- (5) The Judge may dispense with the Attorney-General's obligation to give any notice under **section 49A** relating to the thing if the Judge is satisfied—
 - (a) that compliance with that obligation would endanger the safety of any person; or 35
 - (b) that compliance with that obligation would prejudice ongoing investigations (whether or not in New Zealand) and that the public interest in avoiding that prejudice outweighs the public interest in the Attorney-General giving the notice.

- (6) The public interest in avoiding prejudice to ongoing investigations includes the public interest in avoiding that prejudice so as to maintain co-operation between New Zealand and the foreign country concerned in respect of criminal investigations.
- (7) The public interest in the Attorney-General giving the notice includes the public interest in ensuring that the seized thing is not sent out of New Zealand before—
- (a) the notifiable person concerned has an opportunity to commence proceedings in New Zealand challenging the legality of the issue or making, or execution, of the search warrant or production order and to obtain an order that the thing not be sent out of New Zealand; and
 - (b) if the notifiable person commences proceedings of that kind, those proceedings are finally disposed of or the notifiable person agrees to the thing being sent out of New Zealand.
- Conditions on dispensation*
- (8) The Judge may impose any conditions on a dispensation under this section that relate to sending the thing out of New Zealand.
- (9) Those conditions may include a condition requiring steps to be taken to avoid the risk of things seized or produced under the warrant or production order being sent out of New Zealand that are not evidential material in respect of the offence concerned.
- (10) If a constable applies for the dispensation at the same time as applying for a search warrant, the conditions of the dispensation may be included as conditions of the warrant.
- Certificate*
- 50 Attorney-General to provide certificate as to search and seizure, or production**
- (1) If a search warrant or a production order is issued or made under this subpart, the Attorney-General must, at the request of the Central Authority of the foreign country concerned, provide a certificate to the Central Authority about the relevant matters.
- (2) The **relevant matters**, for a search warrant, are—
- (a) the result of any search conducted under the warrant; and
 - (b) if any thing was seized under the warrant,—
 - (i) the place at which the thing was seized; and
 - (ii) the circumstances in which the thing was seized; and
 - (iii) the custody of the thing.
- (3) The **relevant matters**, for a production order, are—

- (a) the result of the production order; and
- (b) the custody of documents produced under the order.

38 New subpart 6 of Part 3 inserted

After **section 50**, insert:

Subpart 6—Requests for surveillance device warrants 5

Interpretation

50A Interpretation

In this subpart,—

District Court Judge means a Judge appointed under the District Court Act 2016 10

eligible offence, for highly restricted surveillance, means—

- (a) an offence that would be punishable by imprisonment for a term of 7 years or more if the offence were committed in New Zealand; or
- (b) an offence that relates to the same or substantially similar conduct as an offence against any of the following provisions of the Arms Act 1983: 15
 - (i) for trespass surveillance other than by means of a tracking device, section 16(4), 16A, 42A, 42B, 43, 43AA, 44, 44AA, 44A, 45, 50, 50AA, 50A, 50B, 50C, 50CA, 50D, 51, 53A(2), 54, 55, or 55A: 20
 - (ii) for surveillance by means of an interception device, section 16(4), 16A, 42A, 42B, 44, 44A, 45, 50, 50A, 50B, 50C, 50D, 51, 53A(2), 54, 55, or 55A; or
- (c) an offence that relates to the same or substantially similar conduct as an offence against section 25, 26, or 70 of the Psychoactive Substances Act 2013; or
- (d) an offence against section 308A of the Crimes Act 1961 25

material includes intangible material (for example, computer data or a computer program)

raw surveillance data—

- (a) means actual video recordings or actual audio recordings; and
- (b) includes full transcripts, or substantial parts of transcripts, of audio recordings. 30

*Requests***50B Assistance in obtaining evidential material under surveillance device warrant**

- (1) A foreign country may request the Attorney-General to assist in obtaining information under a surveillance device warrant. 5
- (2) The Attorney-General may authorise the New Zealand Police to apply to a Judge for a surveillance device warrant under this subpart if satisfied that—
- (a) the request relates to a criminal matter in respect of an offence against the law of the foreign country that would be punishable by imprisonment for a term of 2 years or more if the offence were committed in New Zealand; and 10
- (b) there are reasonable grounds to believe that the information that would be obtained under the proposed surveillance device warrant if it were issued is relevant to the criminal matter; and
- (c) there are reasonable grounds to believe that— 15
- (i) a place, vehicle, or other thing that would be the object of the surveillance device warrant if that warrant were issued is or will be in New Zealand; or
- (ii) a person who would be the object of the surveillance device warrant if that warrant were issued is or will be present in New Zealand; and 20
- (d) the foreign country has given appropriate undertakings about—
- (i) retaining or destroying raw surveillance data, excerpts from raw surveillance data, and any information obtained from raw surveillance data; and 25
- (ii) any other matter that the Attorney-General considers appropriate.

*General provisions: applications, issue, and authorised activities***50C Applications, issue, and authorised activities**

- (1) If the Attorney-General authorises the New Zealand Police to apply for a surveillance device warrant, a constable may apply to a Judge for a surveillance device warrant. 30
- (2) On an application by a constable to a Judge, the Judge may issue a surveillance device warrant if satisfied that there are reasonable grounds—
- (a) to suspect that an offence against the law of a foreign country has been or will be committed that would be punishable by imprisonment for a term of 2 years or more if the offence were committed in New Zealand; and 35

(b)	to believe that the proposed use of the surveillance warrant will obtain information that is evidential material in respect of the offence.	
(3)	The surveillance device warrant may authorise 1 or more of the activities specified in section 46(1) of the Search and Surveillance Act 2012.	
(4)	However, the Judge may issue a surveillance device warrant that allows highly restricted surveillance only if also satisfied that there are reasonable grounds to suspect that the offence is an eligible offence.	5
	<i>Other applicable provisions of Search and Surveillance Act 2012</i>	
50D	Applications and retention of documents	
(1)	Section 49 of the Search and Surveillance Act 2012 applies in relation to an application made under this subpart.	10
(2)	The following provisions of the Search and Surveillance Act 2012 apply in relation to an application made under this subpart:	
(a)	section 98(2) (requirements for further information):	
(b)	section 99 (verification of an application):	15
(c)	section 100 (mode of an application):	
(d)	section 101 (retention of documents).	
(3)	Those provisions apply as if—	
(a)	a reference in those provisions to an application for a search warrant or to a search warrant included (respectively) a reference to an application made or a surveillance device warrant issued under this subpart; and	20
(b)	a reference in those provisions to the District Court were a reference to the High Court.	
50E	Restriction on issue of warrant facilitating surveillance of communications between lawyer and client	25
	Section 54 of the Search and Surveillance Act 2012 applies in relation to the issue of a surveillance device warrant under this subpart.	
50F	Form and content of warrant	
(1)	Section 55 of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart.	30
(2)	For that purpose, a reference in that section to a provision of the Search and Surveillance Act 2012 that is applied by this subpart is to be read as a reference to that provision as so applied.	
(3)	Section 55(3)(h) of that Act, as applied by this section, does not authorise highly restricted surveillance.	35

50G Persons authorised by warrant

Section 56 of the Search and Surveillance Act 2012 applies to a surveillance device warrant issued under this subpart.

50H Surveillance device warrant reports

Timing and content of report

5

(1) Section 59 of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart, with the following modifications:

(a) a reference in that section to a provision of the Search and Surveillance Act 2012 that is applied by this subpart is to be read as a reference to that provision as so applied:

10

(b) a reference in that section to criminal proceedings is a reference only to criminal proceedings brought in New Zealand.

Judge's actions on receipt of report

(2) Section 61(1) of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart, as modified by this section.

15

(3) A reference in section 61(1) of that Act to a surveillance device report received under section 59 of that Act is to be read as a reference to a report received under **subsection (1)**.

20

(4) A Judge may make an order under **subsection (2)** that a person who is the subject of surveillance be notified only if the Judge is satisfied—

(a) that the public interest in notifying the person outweighs potential prejudice to any 1 or more of the following:

25

(i) any investigation of the New Zealand Police:

(ii) the safety of informants or undercover officers:

(iii) the supply of information to the New Zealand Police:

(iv) any international relationships of New Zealand, including of the New Zealand Police:

(v) New Zealand's interest in maintaining co-operation with the foreign country concerned in respect of criminal investigations; and

30

(b) that one or both of the following apply:

(i) the warrant should not have been issued:

(ii) there has been a serious breach of any of the conditions of the warrant or of any applicable legislation.

35

50I Raw surveillance data and other information acquired by assistant

Section 64A of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart.

50J	Transmission of warrant	
	Section 105 of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart as if a reference in that section to a warrant or search warrant were a reference to that surveillance device warrant.	5
50K	When warrant is invalid	
	Section 107 of the Search and Surveillance Act 2012 applies to a surveillance device warrant issued under this subpart—	
	(a) as if a reference in that section to a search warrant were a reference to that surveillance device warrant; and	10
	(b) as if a reference in that section to the grounds or conditions for lawful issue of a warrant were a reference to the matters that the Judge must be satisfied of under section 50C(2) and (if applicable) section 50C(4) .	
50L	Privilege and confidentiality	
	Subpart 5 of Part 4 of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart.	15
50M	Immunities and offences	
	Subparts 7 and 9 of Part 4 of the Search and Surveillance Act 2012 apply in relation to a surveillance device warrant issued under this subpart.	
50N	Effect of court proceedings	20
	Section 180 of the Search and Surveillance Act 2012 applies in relation to a surveillance device warrant issued under this subpart.	
	<i>Dealing with material collected under warrant</i>	
50O	Collected material to be delivered into custody of Commissioner	
	Any material collected under a surveillance device warrant must—	25
	(a) be delivered into the custody of the Commissioner; and	
	(b) kept in the custody of the Commissioner until otherwise dealt with in accordance with—	
	(i) an order of a District Court Judge under section 140 of the Search and Surveillance Act 2012, as applied by section 50L ; or	30
	(ii) a direction that a Judge gives under section 61(1)(a) of that Act, as applied by section 50H , after receiving a surveillance device warrant report relating to the warrant; or	
	(iii) any of sections 50P to 50T ; or	
	(iv) the Public Records Act 2005 or any other legislation or rule of law.	35

50P	Sections 50Q to 50T subject to Judge’s order or direction about destruction or retention of material	
	Sections 50Q to 50T are subject to—	
	(a) any order that a District Court Judge gives under section 140 of the Search and Surveillance Act 2012, as applied by section 50L , requiring a record of a communication or information made in consequence of surveillance to be destroyed; and	5
	(b) any direction that a Judge gives under section 61(1)(a) of the Search and Surveillance Act 2012, as applied by section 50H , after receiving a surveillance device warrant report relating to a warrant.	10
50Q	Attorney-General’s direction relating to collected material generally	
	The material must be dealt with in accordance with any written direction that the Attorney-General gives to the Commissioner.	
50R	Direction relating to sending material to foreign country	
(1)	Without limiting section 50Q , the Attorney-General may direct the Commissioner to arrange for the material (or any part of that material)—	15
	(a) to be transferred to the custody of the Attorney-General, or of any other person specified in the direction, for sending to an appropriate authority of a foreign country; or	
	(b) to be sent to an appropriate authority of a foreign country.	20
(2)	However, the material (or any part of that material) may be sent out of New Zealand only if the Attorney General is satisfied that—	
	(a) a Judge has been provided with a surveillance device warrant report, as required by section 50H(1) , relating to the warrant; and	
	(b) the Judge has completed the Judge’s review of the report; and	25
	(c) the foreign country has given the appropriate undertakings about retaining or destroying raw surveillance data, excerpts from raw surveillance data, and any information obtained from raw surveillance data; and	
	(d) the foreign country has given any other undertakings that the Attorney-General considers appropriate.	30
(3)	For the purposes of subsection (2)(c) , the appropriate undertakings are undertakings to the effect of the following:	
	(a) except as provided by paragraph (b) , the foreign country will retain material collected under the surveillance device warrant that is raw surveillance data and sent to it under this section for no longer than—	35
	(i) is required for the purposes of criminal proceedings for the offence in relation to which the data was collected under the warrant; or	

- (ii) 5 years if criminal proceedings for that offence have not commenced (but only for as long as the data is required for an ongoing investigation by an appropriate authority of the foreign country):
 - (b) the foreign country will retain any excerpts from the raw surveillance data longer than is provided for in **paragraph (a)(i) or (ii)** only if the appropriate authority of the foreign country is satisfied on reasonable grounds that the excerpts may be required for a future investigation by that authority: 5
 - (c) the foreign country will retain information that is obtained from the raw surveillance data but that is not itself raw surveillance data only if the appropriate authority of the foreign country suspects on reasonable grounds that the information may be relevant to an ongoing or a future investigation by that authority: 10
 - (d) the foreign country will ensure that the raw surveillance data, excerpts, and information are destroyed as soon as practicable after they cease to be retained in accordance with **paragraphs (a), (b), and (c)** (subject to any law of the foreign country requiring the record to be retained as part of a court record). 15
- 50S Retention and destruction of raw surveillance data, etc, that is specified evidential material relating to New Zealand offence** 20
- (1) Sections 63 and 64 of the Search and Surveillance Act 2012 apply to—
 - (a) specified evidential material relating to a New Zealand offence to the extent that the material—
 - (i) is raw surveillance data; and
 - (ii) is not the subject of a direction referred to in **section 50R(1)** (relating to sending material to a foreign country); and 25
 - (b) excerpts from that data; and
 - (c) information obtained from that data that is not itself raw surveillance data.
- (2) For that purpose, section 63 of that Act is to be applied as if a reference in that section to a direction given under section 61(1)(a) of that Act were a reference to that provision as applied by **section 50H**. 30
- (3) In this section, **specified evidential material**, in relation to a New Zealand offence, means evidential material that a person obtains in relation to an offence against the law of New Zealand in the course of carrying out activities authorised by a surveillance device warrant issued under this subpart. 35
- 50T Destruction or retention of other raw surveillance data, etc, that remains in New Zealand**
- (1) This section applies to the extent that any of the material collected under the surveillance device warrant is raw surveillance data that— 40

- (a) is not specified evidential material relating to a New Zealand offence; and
 - (b) is not the subject of a direction referred to in **section 50R(1)** (relating to sending material to a foreign country).
- (2) The Commissioner must ensure that the raw surveillance data, excerpts from that data, and information obtained from that data are deleted or erased as soon as practicable after the prescribed period for the data ends. 5
- (3) **Subsection (2)** does not apply to the data, excerpts, or information to the extent that a direction given by the Attorney-General under **section 50Q** before the prescribed period ends requires the Commissioner— 10
- (a) to delete or erase the data, excerpts, or information before the prescribed period ends; or
 - (b) to keep the data, excerpts, or information after the prescribed period ends.
- (4) In this section,— 15
- prescribed period**, in relation to raw surveillance data that is collected under a surveillance device warrant, means the period of 5 years that starts on the day on which the raw surveillance data is collected under the warrant
- specified evidential material**, in relation to a New Zealand offence, has the meaning given to it in **section 50S**. 20

Other

50U Admissibility of evidential material relating to New Zealand offence

- (1) This section applies to evidential material obtained in relation to an offence against the law of New Zealand in the course of carrying out activities authorised by a surveillance device warrant issued under this subpart if a surveillance device warrant could have been issued under the Search and Surveillance Act 2012 in relation to that offence. 25
- (2) The evidential material is not inadmissible in criminal proceedings in New Zealand merely because the surveillance device warrant was issued in relation to an offence against the law of a foreign country. 30

Compare: 2012 No 24 s 57

50V Annual reporting by Commissioner of Police

- (1) The Commissioner must include the following information in every annual report that the Commissioner prepares for the purposes of section 43 of the Public Finance Act 1989: 35
- (a) the number of applications under this subpart that were granted or refused in the period covered by the report:

- (b) the number of surveillance device warrants issued under this subpart in the period covered by the report that authorised the use of a surveillance device, and the number in respect of each kind of surveillance device:
- (c) the number of surveillance device warrants issued under this subpart during the period covered by the report that authorised entry into private premises: 5
- (d) for each kind of surveillance device authorised by a surveillance device warrant issued under this subpart during the period covered by the report, the numbers of that kind of device used—
 - (i) for a period of no more than 24 hours: 10
 - (ii) for a period of more than 24 hours but no more than 3 days:
 - (iii) for a period of more than 3 days but no more than 7 days:
 - (iv) for a period of more than 7 days but no more than 21 days:
 - (v) for a period of more than 21 days but no more than 60 days:
- (e) the number of persons charged in criminal proceedings instituted in a foreign country where the collection of evidential material relevant to those proceedings was, so far as the Commissioner is aware, significantly assisted by carrying out activities under the authority of a surveillance device warrant issued under this subpart in the period covered by the report: 15
20
- (f) if a Judge has reported to the Commissioner under section 61(1) of the Search and Surveillance Act 2012 (as applied by **section 50H**) about a breach of any of the conditions of a surveillance device warrant issued under this subpart,—
 - (i) the number of those reports; and 25
 - (ii) details of the breaches or the lack of authorisation reported.
- (2) This section does not require the Commissioner to include in any annual report information about any prescribed surveillance, or surveillance of a prescribed kind, in any prescribed area or an area of a prescribed kind.
- (3) In this section, **kind of surveillance device** means any of the following: 30
 - (a) an interception device:
 - (b) a surveillance device:
 - (c) a tracking device.

Compare: 2012 No 24 ss 170(1)(f), (2)(e), (3), 172

- 39 Cross-heading above section 51 replaced** 35
Replace the cross-heading above section 51 with:

Subpart 7—Assistance in arranging service of process

- 40 Cross-heading above section 54 replaced**
Replace the cross-heading above section 54 with:
Subpart 8—Requests to enforce foreign restraining orders and foreign forfeiture orders
- 41 Cross-heading above section 59 replaced** 5
Replace the cross-heading above section 59 with:
Subpart 9—Requests for warrants and orders under Criminal Proceeds (Recovery) Act 2009
- 42 Section 61 amended (Request for production order in New Zealand)**
In section 61(2), after “Criminal Proceeds (Recovery) Act 2009”, insert “for a production order under section 105 of that Act”. 10
- 43 Section 62 amended (Request for examination order in New Zealand)**
In section 62(2), after “Criminal Proceeds (Recovery) Act 2009”, insert “for an examination order under section 107 of that Act”.
- 44 Consequential amendments related to this subpart** 15
Amend the legislation specified in **Part 2 of Schedule 2** as set out in that schedule.
Subpart 3—Amendments to Telecommunications (Interception Capability and Security) Act 2013
- 45 Principal Act** 20
This subpart amends the Telecommunications (Interception Capability and Security) Act 2013.
- 46 Section 3 amended (Interpretation)**
(1) In section 3(1), repeal the definitions of **call associated data** and **number**.
(2) In section 3(1), insert in its appropriate alphabetical order: 25
traffic data has the meaning given in **section 3AB**
- 47 New section 3AB inserted (Meaning of traffic data)**
After section 3A, insert:
3AB Meaning of traffic data
(1) In this Act, **traffic data**, in relation to a telecommunication,— 30
(a) means information that is generated as a result of the making of the telecommunication (whether or not the telecommunication is sent or

received successfully) and that identifies all or any of the following, as applicable to the telecommunication:	
(i) the nature of the telecommunication (including, for example, file transmission, email, and instant messaging):	
(ii) the path of the telecommunication, including (for example) the origin, direction, and destination of the telecommunication and, if the telecommunication is diverted from one number to another number, those numbers:	5
(iii) the time at which, and date on which, the telecommunication is sent:	10
(iv) the duration of the telecommunication:	
(v) the termination of the telecommunication:	
(vi) the size of any data or files transmitted by way of the telecommunication; but	
(b) excludes the content of the telecommunication.	15
(2) In subsection (1) ,—	
(a) a reference to information identifying the origin of a telecommunication is a reference to information identifying—	
(i) the number from which the telecommunication originates; and	
(ii) if the telecommunication is generated from a mobile telephone, the point at which the telecommunication first enters a network; and	20
(b) a reference to information identifying the destination of a telecommunication is a reference to information identifying the number to which the telecommunication is sent.	25
(3) In subsection (2), number , in relation to a telecommunication, means the number, identifier, or address used by a network operator or a service provider for the purposes of—	
(a) identifying the origin of the telecommunication; and	
(b) directing the telecommunication to its intended destination.	30
Examples	
Examples of a number, as defined, include the following:	
• a telephone number:	
• a mobile telephone number:	
• a unique identifier for a telecommunication device (for example, an electronic serial number or a Media Access Control address):	35
• a user account identifier:	
• an Internet Protocol address:	

	• an email address.	
48	Section 10 amended (When duty to have full interception capability is complied with) In section 10(1)(b) and (c) and (2), replace “call associated data” with “traffic data”.	5
49	Section 11 amended (Interception ready) In section 11(1)(c), replace “call associated data” with “traffic data”.	
50	Section 24 amended (Duty to assist) In section 24(3)(b)(ii) and (iii), replace “call associated data” with “traffic data”.	10
51	Section 42 amended (Notice relating to formatting) In section 42(1), replace “call associated data” with “traffic data”.	
52	Section 44 amended (Formatting before commencement of this Act) In section 44, insert as subsection (2): (2) In this section, call associated data has the meaning given in section 3(1), as in force immediately before the commencement of section 46(1) of the Budapest Convention and Related Matters Legislation Amendment Act 2024 .	15
53	Consequential amendments related to this subpart Amend the legislation specified in Part 3 of Schedule 2 as set out in that schedule.	20

Part 2

Amendments to Crimes Act 1961

54	Principal Act This Part amends the Crimes Act 1961.	
55	Section 216B amended (Prohibition on use of interception devices) Repeal section 216B(7).	25
56	Section 228A renumbered as section 239A and repositioned (Designing, manufacturing, or adapting goods with intent to facilitate commission of crimes involving dishonesty) Renumber section 228A as section 239A and reposition it after section 239.	30

- 57 New cross-heading above section 239A (as renumbered and repositioned by section 56 of this Act) inserted**
- Before **section 239A** (as renumbered and repositioned by **section 56** of this Act), insert:
- Goods that facilitate commission of crimes involving dishonesty* 5
- 58 Section 228B amended, renumbered as section 239B, and repositioned (Possessing, selling, or disposing of goods designed, manufactured, or adapted with intent to facilitate commission of crimes involving dishonesty)**
- (1) In the heading to section 228B, replace “**or disposing of**” with “**disposing of, or procuring**”. 10
- (2) In section 228B, replace “or disposes of” with “disposes of, or procures”.
- (3) Renumber section 228B as **section 239B** and reposition it after **section 239A** (as renumbered and repositioned by **section 56** of this Act).
- 59 Section 228C renumbered as section 239C and repositioned (Possessing goods capable of being used to facilitate crimes involving dishonesty with intent to facilitate commission of those offences)** 15
- Renumber section 228C as **section 239C** and reposition it after **section 239B** (as renumbered and repositioned by **section 58** of this Act).
- 60 Section 248 amended (Interpretation)** 20
- In section 248, replace “sections 249 to 252” with “sections 249 to **254**.”
- 61 Section 251 repealed (Making, selling, or distributing or possessing software for committing crime)**
- Repeal section 251.
- 62 New sections 253 and 254 inserted** 25
- After section 252, insert:
- 253 Designing, writing, or adapting software for committing certain crimes**
- (1) A person who designs, writes, or adapts software commits an offence if—
- (a) the resulting software would enable a person to commit an offence against section 249, 250, or 252; and 30
- (b) the person intends to use the resulting software (or intends any other person to use it) to commit an offence against section 249, 250, or 252.
- (2) A person who commits an offence against this section is liable to imprisonment for a term not exceeding 2 years.

254	Dealing in or possessing software or other information for committing crime	
	<i>Offence: dealing in software or other information</i>	
(1)	A person who deals in software or other information commits an offence if the software or other information would enable another person to access a computer system without authorisation and at least 1 of the following applies:	5
(a)	the person—	
(i)	promotes the software or other information as being useful for committing an offence (whether or not they also promote it as being useful for any other purpose); and	10
(ii)	knows or is reckless as to whether it will be used to commit an offence:	
(b)	the person intends the software or other information to be used by any other person to commit an offence:	
(c)	the person knows that the sole or main use of the software or other information is to commit an offence.	15
(2)	A person deals in software or other information if the person—	
(a)	invites any other person to acquire it from the person; or	
(b)	offers or exposes it for sale or supply to any other person; or	
(c)	agrees to sell or supply it to any other person; or	20
(d)	sells or supplies it to any other person; or	
(e)	possesses it for the purpose of sale or supply to any other person; or	
(f)	procures it for use by any other person.	
	<i>Offence: possessing software or other information</i>	
(3)	A person commits an offence if the person—	25
(a)	possesses any software or other information that would enable the person to access a computer system without authorisation; and	
(b)	intends to use that software or other information to commit an offence.	
	<i>Penalty</i>	
(4)	A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 2 years.	30

Schedule 1
New Schedule 1 inserted into Search and Surveillance Act 2012

s 24

Schedule 1
Transitional, savings, and related provisions

5

s 3A

Part 1
Provisions relating to Budapest Convention and Related Matters
Legislation Amendment Act 2024

- 1 Definition of amendment Act** 10
- (1) In this Part, **amendment Act** means the Budapest Convention and Related Matters Legislation Amendment Act **2024**.
- (2) In this Part,—
- (a) a reference to a new provision is a reference to the provision as inserted by the amendment Act; and 15
- (b) a reference to an old provision is a reference to the provision as in force immediately before it is replaced by the amendment Act.
- 2 Particulars in surveillance device warrants relating to call associated data**
- Old section 55(3)(g) continues to apply to any surveillance device warrant issued after new **section 55(3)(g)** commences if the application for the warrant is made before that commencement. 20
- 3 Record of information obtained, made, or generated by person when assisting in executing surveillance device warrant**
- (1) New **section 64A** extends to a person who, before that section commences, obtains, makes, or generates any record of information as a consequence of assisting an enforcement officer to whom a surveillance device warrant is directed. 25
- (2) However, that section extends to the person only if the warrant expires on or after the date on which that section commences.
- 4 Retention and copying of documents produced under production order** 30
- Sections 78 and 79, as amended by the amendment Act, extend to a document that is produced in compliance with a production order that is made before those amendments commence.

Schedule 2

Consequential amendments related to Part 1

ss 26, 44, 53

Part 1

Amendments to Search and Surveillance Act 2012 related to renumbering of Schedule 5

In section 3(1), definition of **enforcement officer**, paragraph (b), replace “the Schedule” with “**Schedule 2**”.

In section 3(1), definition of **search power**, paragraph (a), replace “the Schedule” with “**Schedule 2**”. 10

In section 3(1), definition of **search power**, paragraph (b), replace “the Schedule” with “**Schedule 2**”.

In section 51(a)(i), replace “the Schedule” with “**Schedule 2**”.

In section 72(a), replace “the Schedule” with “**Schedule 2**”.

Replace section 89(2)(a) with: 15

- (a) the enactments listed in column 2 of **Schedule 2**, to the extent identified in column 4 of **Schedule 2**:

In section 89(3), replace “the Schedule” with “**Schedule 2**”.

In section 89(4), replace “the Schedule” with “**Schedule 2**”.

In section 97, definition of **applicant**, paragraph (b), replace “the Schedule” with “**Schedule 2**”. 20

In section 103(4)(m)(ii), replace “the Schedule” with “**Schedule 2**”.

In section 107(1)(a), replace “the Schedule” with “**Schedule 2**”.

In section 121(1), replace “the Schedule” with “**Schedule 2**”.

In section 121(2), replace “the Schedule” with “**Schedule 2**”. 25

In section 149(1), replace “the Schedule” with “**Schedule 2**”.

In section 169(2), replace “the Schedule” with “**Schedule 2**”.

In section 171(1), replace “the Schedule” with “**Schedule 2**”.

In section 180(1)(a), replace “the Schedule” with “**Schedule 2**”.

In section 180(1)(b), replace “the Schedule” with “**Schedule 2**”. 30

In section 180(1)(c), replace “the Schedule” with “**Schedule 2**”.

In section 352(2), replace “the Schedule” with “**Schedule 2**”.

Part 2

Consequential amendment related to subpart 2 of Part 1

Mutual Assistance in Criminal Matters Regulations 1993 (SR 1993/92)

In the Schedule, revoke form 4.

Part 3

5

Consequential amendments related to subpart 3 of Part 1

Intelligence and Security Act 2017 (2017 No 10)

In section 144, definition of **business records**, paragraph (a)(i)(G), replace “call associated data” with “traffic data”.

Telecommunications Act 2001 (2001 No 103)

10

In section 107(1)(a), replace “call associated data” with “traffic data”.

Replace section 107(2) with:

(2) In this section,—

telephone analyser means any device—

- (a) that can be connected to any part of a network, or to any line, apparatus, or equipment connected to any part of a network; and
- (b) that is designed to record or enable the recording of traffic data, but cannot record or monitor, or enable the recording or monitoring of, the content of any telecommunication

15

traffic data has the same meaning as in **section 3AB** of the Telecommunications (Interception Capability and Security) Act 2013.

20