

Proactive Release

Date: 06 March 2024

The following Cabinet paper and related Cabinet minutes have been proactively released by the Minister of Foreign Affairs:

| Title | Reference |
|--|------------------|
| Report of the Cabinet Business Committee: Period Ended 22 December 2023 | CAB-24-MIN-0003 |
| Concluding negotiating mandate for a United Nations convention on Cybercrime | CBC-23-MIN-0028 |
| Concluding negotiating mandate for a United Nations convention on Cybercrime | |

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Key to redaction codes:

- 6(a): to avoid prejudicing the international relations of the New Zealand Government;
- 6(b): to protect the passing of information from another government on a confidential basis;
- 9(2)(g)(i): to protect the free and frank expression of opinions by departments; and
- 9(2)(j): to avoid prejudice to negotiations.

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Cabinet

Minute of Decision

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Report of the Cabinet Business Committee: Period Ended 22 December 2023

On 23 January 2024, Cabinet made the following decisions on the work of the Cabinet Business Committee for the period ended 22 December 2023:

CBC-23-MIN-0028 **Concluding Negotiating Mandate for a United Nations Convention on Cybercrime** CONFIRMED
Portfolio: Foreign Affairs

Rachel Hayward
Secretary of the Cabinet

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Cabinet Business Committee

Minute of Decision

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Concluding Negotiating Mandate for a United Nations Convention on Cybercrime

Portfolio Foreign Affairs

On 20 December 2023, the Cabinet Business Committee:

- 1 **noted** that negotiations on a new United Nations cybercrime convention are due to conclude during a negotiating round scheduled for 29 January - 9 February 2024;
- 2 **noted** that the Ministry of Foreign Affairs and Trade will lead New Zealand's negotiating team along with the National Security Policy Directorate (Department of Prime Minister and Cabinet) and support from the Ministry of Justice, the Department of Internal Affairs, New Zealand Police, Crown Law Office and the New Zealand Customs Service;
- 3 **authorised** the Minister of Foreign Affairs, Minister of Justice, Attorney-General, Minister of Police, and Minister of Internal Affairs to have Power to Act to approve updates to negotiation instructions as required;
- 4 **noted** that officials have undertaken consultation with interested stakeholders on draft principles and objectives for New Zealand's engagement in the negotiations and that input from these consultations, as well as that received through public submissions, has been reflected in the paper attached under CBC-23-SUB-0028;
- 5 **noted** that officials will continue targeted consultation throughout the negotiations;
- 6 **agreed** that New Zealand seek a treaty that:

General principles

- 6.1 contains a harmonised, modern and effective global framework for cooperation and coordination between states to tackle the growing threat posed by cybercrime to individuals, business and governments; and includes the provision of support and technical assistance for all states to develop capacity and capability to respond to these challenges; and
- 6.2 complements existing instruments, such as the Budapest Convention and existing mutual legal assistance and information sharing obligations;

Human rights safeguards

- 6.3 is consistent with international human rights obligations, and contains specific safeguards written into the text of the agreement explicitly reaffirming these obligations;
- 6.4 provides for the sharing of computer data with another state, only when the receiving state guarantees equivalent privacy protections and will seek consent from the requested state before sharing any data with another state or international organisation;

Criminalisation

- 6.5 is focused on combating a set of core cyber dependent crimes, and a limited range of cyber enabled crimes where the scale, scope and speed of the offence is significantly altered by the use of a computer or other similar device;
- 6.6 s9(2)(j)

Law enforcement and procedural measures

- 6.7 contains law enforcement and procedural measures that would enable the effective investigation and prosecution of cybercrime, subject to adequate human rights safeguards;
- 6.8 s9(2)(j)

International cooperation

- 6.9 contains provisions that would enable international cooperation between states to combat cybercrime, subject to adequate human rights safeguards;
- 6.10 s9(2)(j)

Terminology

- 6.11 contains clearly defined terminology that draws on, and is complementary, to existing international instruments such as the Budapest Convention;

Preventative measures

- 6.12 includes measures for states to implement coordinated policies and best practices to prevent cybercrime and reduce the impact of harm to victims;

Technical assistance and capacity building

- 6.13 includes provisions that would enable capacity-building to assist states in the detection, prevention, investigation and prosecution of cybercrime;

7 s9(2)(j)

8 s9(2)(j)

9 **agreed** that in circumstances where officials consider further Ministerial instruction is needed the Minister of Foreign Affairs, Minister of Justice, Attorney-General, Minister of Police and Minister of Internal Affairs have Power to Act to take decisions on New Zealand's position;

10 **noted** that if the convention is adopted, there will be a separate Cabinet process for New Zealand to consider signature of the final agreement, and a separate domestic process for Parliament to consider the treaty before it is ratified.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Winston Peters (Chair)
Hon David Seymour
Hon Brooke van Velden
Hon Simeon Brown
Hon Paul Goldsmith
Hon Dr Shane Reti
Hon Shane Jones
Hon Judith Collins

Officials present from:

Department of the Prime Minister and Cabinet

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Office of the Minister of Foreign Affairs

Chair, Cabinet Business Committee

Concluding negotiating mandate for a United Nations convention on Cybercrime

Proposal

- 1 This paper seeks approval of a closing mandate for a United Nations convention to combat cybercrime.
- 2 The paper outlines the current shape of the convention and proposes New Zealand's positions on key substantive issues.
- 3 Finally, this paper also seeks delegated authority for the Minister of Justice, Attorney-General, Minister of Police, Minister of Internal Affairs and myself to take decisions, as required, on any proposed negotiating outcomes which may be needed to finalise the Agreement, beyond those covered by the mandate outlined in this paper.

Relation to government priorities

- 4 This is an international negotiation, which requires a Cabinet approved negotiating mandate.

Executive Summary

- 5 In 2019, United Nations (UN) Member States adopted resolution 74/247 establishing a process to negotiate a convention on cybercrime.¹
- 6 The new convention is intended to counter the use of information and communications technologies for criminal purposes. It presents an opportunity to develop and foster global cooperation on combatting cybercrime. However, the convention also comes with a potential risk that some states may seek to misuse its provisions to advance a state-centric model of internet governance. New Zealand is working to mitigate those risks.
- 7 Cabinet granted an initial negotiating mandate in December 2021 (ERS-21-MIN-0050), which has served as the basis for the first six rounds of negotiation. The seventh and potentially concluding round is scheduled for 29 January – 9 February 2024.
- 8 The Ministry of Foreign Affairs and Trade is leading New Zealand's negotiating team, along with the National Security Policy Directorate (Department of Prime Minister and Cabinet), and with support from the Ministry of Justice, the Department of Internal Affairs, New Zealand Police, Crown Law Office and the New Zealand Customs Service.

¹ Officially titled, the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes.

- 9 Officials have consulted with interested stakeholders prior to developing the initial principles and objectives for New Zealand's engagement in the negotiations. Additionally, officials have conducted targeted public consultation throughout the negotiations.
- 10 I propose that New Zealand maintains its overarching goal for the negotiation, which is to seek a harmonised, modern and effective global framework for cooperation and coordination between states to tackle the growing threat posed by cybercrime to individuals, business and governments. This includes the provision of support and technical assistance for all states to develop capacity and capability to respond to these challenges.
- 11 Should it be required, I recommend that the Minister of Justice, Attorney-General, Minister of Police, Minister of Internal Affairs and myself are given delegated authority to approve any updates to negotiating or voting instructions as required.
- 12 If the negotiations conclude, there will be a separate Cabinet process for New Zealand to consider signature of the final agreement, including a National Interest Analysis, and a separate domestic process for Parliament to consider the treaty before it is ratified.

Background

- 13 This process was instigated by Russia in December 2019, with the introduction of UN General Assembly resolution 74/247, which proposed to establish a negotiation toward a new international convention on cybercrime.
- 14 Alongside a number of likeminded partners, New Zealand opposed the initiation of a s6(a)

Further, we held concerns that a new convention in this area may undermine or conflict with the Council of Europe Convention on Cybercrime (the "Budapest Convention"), which New Zealand is in the process of acceding to. Nevertheless, the resolution succeeded following a divided vote in the UN Third Committee. Accordingly, New Zealand has engaged in the process to ensure that our interests in a free, open and secure cyberspace are maintained in what would be the UN's first major treaty on cyber issues.

- 15 There have been six negotiating rounds so far. The seventh round is scheduled for 29 January – 9 February 2024. It is listed as the "concluding round" in the UN's programme of work and we understand the Chair is seeking to reach a decision, however a range of concluding scenarios remain possible (adoption by consensus, a vote, and/or mandate extension) due to the stark differences in opinion that remain between states.

Analysis

- 16 Addressing cybercrime and cyber-enabled crime has been a priority for New Zealand and the broader Pacific region. Our region's increasing reliance on digital connectivity has heightened the need to ensure robust cyber security practices. The

frequency and severity of attacks by malicious actors has increased significantly in recent years and effective cyber security is critical to our economic and security resilience.

- 17 New Zealand's national cyber security strategy and the Pacific Island Forum's 2018 Boe Declaration both set action on cybercrime as an important focus. New Zealand is in the process of completing accession to the Budapest Convention as part of our effort to more effectively counter this threat. Accession to the Budapest Convention was a recommendation from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (CBC-20-MIN-0129 refers).
- 18 The Budapest Convention is an important reference point for the UN cybercrime convention, as it is a well-established and effective framework for cooperation on cross-border investigations and prosecutions, enables lawful access to electronic evidence, clearly defines cybercrimes and outlines expectations for international agencies to assist each other. Although New Zealand's legislative framework largely aligns with the requirements of the Budapest Convention, some legislative changes are necessary, mainly for procedural provisions to preserve electronic evidence. These changes will be implemented as part of New Zealand's accession to the Budapest Convention.² During this negotiation, New Zealand has used the technical content of the Budapest Convention as a key point of reference, ensuring that the commitments we will undertake after we accede to Budapest inform the substance of New Zealand's negotiating positions.
- 19 Despite our initial reservations, conclusion of the negotiations for a UN convention would provide a further opportunity to help fulfil the vision and values set out in New Zealand's 2019 Cyber Security Strategy: *New Zealanders are secure online, that human rights are protected for all, that opportunities for growth are enhanced, and that our national security is protected*. It would also support the delivery of two of the Strategy's five priority areas to improve cyber security, "proactively tackle cybercrime" and "internationally active". As the UN's first major treaty on cyber issues, if concluded its content and terminology are also expected to influence other bodies and regional groups as they consider new and emerging issues, and set standards and benchmarks for future international negotiations in the cyber and digital space.

New Zealand's objectives for the negotiation

- 20 I propose that New Zealand maintain its overarching goal for the new treaty of seeking a harmonised, modern and effective global framework for cooperation and coordination between states to tackle the growing threat posed by cybercrime to individuals, business and governments. This includes the provision of support and technical assistance for all states to develop capacity and capability to respond to these challenges.

² Drafting of the Bill to align New Zealand's legislative framework with the Budapest Convention's requirements is at an advanced stage and s9(2)(g)(i), subject to Parliamentary Counsel Office availability and House time. The Minister of Justice received further advice recommending work continue on Budapest Convention accession in the priority briefing on investigatory tools.

- 21 Further, the new convention should not conflict with existing instruments, such as the Budapest Convention, and existing mutual legal assistance and information sharing obligations.

The key substantive provisions in the UN Cybercrime Convention

- 22 The convention is organised around six main substantive topics:
- Criminalisation;
 - Law enforcement and procedural measures;
 - International cooperation;
 - Preventative measures;
 - Technical assistance and capacity building; and
 - General provisions related to human rights safeguards and terminology.
- 23 Additionally, there are a number of important human rights provisions and safeguards throughout the text.

Criminalisation chapter

- 24 The current draft³ proposes to criminalise five cyber dependent crimes: illegal access, illegal interception, interference with [computer data] [digital information]⁴, interference with a [computer system] [ICT (Information Communication Technology) device], and misuse of devices. These proposals are drawn directly from, and essentially mirror, the criminalisation provisions of the Budapest Convention and would not require New Zealand to make any domestic legislative changes in order to implement its obligations under the proposed UN convention.
- 25 In addition, the convention also seeks to criminalise six cyber-enabled crimes. These include cyber enabled fraud and theft offences, offences targeting the online sexual abuse and exploitation of children, online grooming of children, and the non-consensual sharing of intimate images. The draft text of these provisions is more comprehensive than the Budapest Convention, but still not finalised and it is too early to say whether New Zealand would need to amend its domestic laws to implement the obligations.

- 26 s9(2)(j)

Procedural and law enforcement measures

³ s6(a)

⁴ The terminology in the convention has not been finalised.

- 27 The draft convention requires that states implement procedural and law enforcement measures to effectively combat cybercrime. The provisions mirror the Budapest Convention. They include expedited preservation of stored computer data/digital information, expedited preservation and partial disclosure of traffic data, production orders, search and seizure of stored [computer data] [digital information], real-time collection of traffic data, and interception of content data.
- 28 Except for the requirements related to preservation of stored data, New Zealand's domestic legislative framework is sufficient to implement the obligations arising from the current draft chapter on law enforcement and procedural measures. Further, the legislative changes New Zealand will make in the process of acceding to the Budapest Convention may ensure compliance with the provisions on preservation of stored data in the procedural measures chapter of the convention. However, recent drafts have extended the procedural powers in the international cooperation chapter beyond those in the Budapest Convention. Officials will conduct a full assessment of the implications once the text is finalised.
- 29 The powers and procedures established by this convention would apply to the offences agreed within the criminalisation chapter and to the collection of evidence in electronic form of serious crimes⁵, whether or not those crimes have a cyber-element. This 'extended scope' approach is similar to the Budapest Convention, which applies its procedural powers to all crimes committed by means of a computer system or for the collection of evidence. s9(2)(j)
- 30 Accordingly, we have advocated for the scope of the procedural and law enforcement powers in this convention to apply only to the offences agreed within the criminalisation chapter. This would ensure there is certainty as to how the convention would be utilised by states. s6(b)(i)
- 31 Given this, New Zealand has also advocated strongly for the inclusion of specific safeguards within the chapter to mitigate our concerns. At a minimum, these safeguards should include a requirement for states to implement the powers and procedures in accordance with their obligations under international human rights law, and incorporate the principle of proportionality. Further, New Zealand has advocated for conditions and safeguards that include judicial or other independent review, grounds justifying application, and limitation of the scope and the duration of the power or procedure.

⁵ The definition of serious crime is yet to be agreed, but previous drafts have used the model of the United Nations Convention against Transnational Organised Crime, which defines serious crimes as offences attracting at least a four-year sentence of imprisonment.

32 I would propose that New Zealand continue to advocate for limiting the scope of the law enforcement and procedural measures to the offences agreed in the convention. s9(2)(j)

33 Provisions in the draft convention relating to protection and assistance for victims of cybercrime s9(2)(j)

Once the text is finalised, officials will carry out further work to determine what, if any, domestic changes would be required to comply with these provisions.

International cooperation

34 The international cooperation chapter sets out how states will cooperate under the convention, including in relation to the powers and procedures set forth in the convention. Like the procedural and law enforcement measures chapter, the international cooperation provisions apply to the offences agreed within the convention, but also to the collection and sharing of evidence in electronic form for 'serious crimes'. Consistent with our position on the procedural and law enforcement measures chapter, New Zealand has also expressed reservations about this 'extended scope' approach in the international cooperation chapter.

35 Accordingly, we have advocated that the international cooperation chapter apply solely to the offences agreed and defined in the convention. s6(b)(i)

36 New Zealand therefore has also advocated for specific grounds to refuse cooperation, including if the requested party believes the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, language, religion, nationality, ethnic origin or political opinions, or that compliance with the request would cause prejudice to that person's position for any one of these reasons. s6(a)

37 I would propose that New Zealand continue to advocate for limiting the scope of the international cooperation chapter to the offences in the convention. s9(2)(j)

Further human rights safeguards

- 38 New Zealand has successfully advocated for a clear statement within the general provisions that states will implement this convention in accordance with their obligations under international human rights law.
- 39 Provisions on privacy are an important safeguard to ensure that computer data is shared only with states who have equivalent protections to the requested state. This is consistent with our Privacy Act 2020 information privacy principles to prevent unauthorised disclosure and sharing with third party states or international organisations without the requested state's consent. New Zealand has advocated in favour of a robust provision on data protection within this convention. The current draft contains a protection of personal data clause.

Terminology

- 40 New Zealand has advocated for clearly defined terms, which draw on established international instruments such as the Budapest Convention. These terms have not only been adopted by the 68 parties to the Budapest Convention, but also by other states as recognised international best practice. The terminology section of the convention remains unfinished. I propose that New Zealand continues to advocate for terms that align with the Budapest Convention.

Preventative measures

- 41 The preventative measures chapter proposes that states implement coordinated policies and best practices to reduce the opportunities for cybercrime to cause harm. The measures include the rehabilitation of offenders, raising public awareness of child sexual abuse or child sexual exploitation online, developing strategies to reduce gender-based violence online, delivering effective training for criminal justice stakeholders and implementing support programmes for victims. These preventative measures have drawn a broad consensus of support and I propose that New Zealand continues to advocate for them.

Technical assistance and capacity building

- 42 The provisions on technical assistance set out a number of largely voluntary provisions relating to technical assistance and capacity building measures, including the prevention, detection, investigation and prosecution of the offences covered by the convention. I propose that New Zealand continues to advocate for provisions that would enable effective capacity building cooperation between states, and for provisions that would complement existing capacity building measures, such as those New Zealand has in place with Pacific Island partners.

Cost-of-living Implications

- 43 There are no expected cost of living implication arising from this process.

Financial Implications

- 44 The financial implications for New Zealand of a new treaty will depend on the final outcome of negotiations and the Government's decision on whether or not to become

a party. Advice on this will be provided alongside recommendations as to whether New Zealand should ratify the treaty if one is adopted.

Legislative Implications

- 45 Given the negotiation is still ongoing, it is difficult to predict the exact shape of the final treaty and the likely form and content of any implementing legislation that might be required. s9(2)(j)

If implementing legislation is required, Cabinet would be informed of this if approval is sought for New Zealand to become a party to the treaty.

Impact Analysis

Regulatory Impact Statement

- 46 An extended National Interest Analysis (incorporating a Regulatory Impact Analysis) will be presented to Cabinet when negotiations have concluded, if approval is sought from Cabinet for New Zealand to become a party to a new treaty.

Human Rights

- 47 There are no expected inconsistencies with the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990 at this stage. As noted above, a key principle for New Zealand's engagement in negotiations is that any convention is consistent with states' obligations to respect and protect human rights online.

Consultation

- 48 The following agencies were involved in development of this paper: the Ministry of Foreign Affairs and Trade, the Department of the Prime Minister and Cabinet, the Ministry of Justice, the Department of Internal Affairs, Crown Law, New Zealand Police, New Zealand Customs Service.
- 49 Prior to finalising the initial Cabinet mandate for this negotiation, officials undertook public consultation with interested stakeholders on principles and objectives for New Zealand's engagement in the negotiations. Officials have also continued to undertake targeted outreach throughout the negotiations. This outreach has been led by DPMC and has involved establishing a list of interested stakeholders, sending out updates and requests for feedback to those who registered interest in the process, and supplementing this with the use of DPMC's online consultation portal. Over the course of the negotiations, a total of 30 submissions have been received.

Proactive Release

- 50 I propose to proactively release this Cabinet paper, excepting those parts that would undermine New Zealand's negotiating position or prejudice our international relations.

Communications

- 51 If the negotiations conclude, officials will propose a communications plan when/if a further Cabinet decision is sought for New Zealand to sign up to the agreement.

Recommendations

The Minister of Foreign Affairs recommends that the Committee:

- 1 Note that negotiations on a new United Nations cybercrime convention are due to conclude during a negotiating round scheduled for 29 January - 9 February 2024.
- 2 Note the Ministry of Foreign Affairs and Trade will lead New Zealand's negotiating team along with the National Security Policy Directorate (Department of Prime Minister and Cabinet) and support from the Ministry of Justice, the Department of Internal Affairs, New Zealand Police, Crown Law Office and the New Zealand Customs Service.
- 3 Agree that the Minister of Justice, Attorney-General, Minister of Police, Minister of Internal Affairs alongside myself are given powers to act to approve updates to negotiation instructions as required.
- 4 Note officials have undertaken consultation with interested stakeholders on draft principles and objectives for New Zealand's engagement in the negotiations. The input from these consultations, as well as that received through public submissions, has been reflected in this paper.
- 5 Note officials will continue targeted consultation throughout the negotiations.
- 6 Agree that New Zealand seek a treaty that:

General principles

- 6.1 Contains a harmonised, modern and effective global framework for cooperation and coordination between states to tackle the growing threat posed by cybercrime to individuals, business and governments; and includes the provision of support and technical assistance for all states to develop capacity and capability to respond to these challenges; and
- 6.2 Complements existing instruments, such as the Budapest Convention and existing mutual legal assistance and information sharing obligations.

Human rights safeguards

- 6.3 Is consistent with international human rights obligations, and contains specific safeguards written into the text of the agreement explicitly reaffirming these obligations.
- 6.4 Provides for the sharing of computer data with another state, only when the receiving state guarantees equivalent privacy protections and will seek consent from the requested state before sharing any data with another state or international organisation.

Criminalisation

- 6.5 Is focused on combating a set of core cyber dependent crimes, and a limited range of cyber enabled crimes where the scale, scope and speed of the offence is significantly altered by the use of a computer or other similar device.
- 6.6 s9(2)(j)

Law enforcement and procedural measures

- 6.7 Contains law enforcement and procedural measures that would enable the effective investigation and prosecution of cybercrime, subject to adequate human rights safeguards.
- 6.8 s9(2)(j)

International cooperation

- 6.9 Contains provisions that would enable international cooperation between states to combat cybercrime, subject to adequate human rights safeguards.
- 6.10 s9(2)(j)

Terminology

- 6.11 Contains clearly defined terminology that draws on, and is complementary, to existing international instruments such as the Budapest Convention.

Preventative measures

- 6.12 Includes measures for states to implement coordinated policies and best practices to prevent cybercrime and reduce the impact of harm to victims.

Technical assistance and capacity building

- 6.13 Includes provisions that would enable capacity-building to assist states in the detection, prevention, investigation and prosecution of cybercrime.
- 7 s9(2)(j)
- 8 s9(2)(j)

- 9 Agree that in circumstances where officials consider further Ministerial instruction is needed the Minister of Justice, Attorney-General, Minister of Police, Minister of Internal Affairs, and myself should have the power to act and take decisions on New Zealand's position.
- 10 Note that if the convention is adopted, there will be a separate Cabinet process for New Zealand to consider signature of the final agreement, and a separate domestic process for Parliament to consider the treaty before it is ratified.

Rt Hon Winston Peters

Minister of Foreign Affairs

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