

# Proactive Release

Date: 21 February 2022

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

## **Negotiating Mandate for New Treaty on Cybercrime**

**(CAB-21-MIN-0539 refers)**

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to redaction codes:

- 6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government; and
- 9(2)(j): to avoid prejudice to negotiations.

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# Cabinet

## Minute of Decision

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*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

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### **Report of the Cabinet External Relations and Security Committee: Period Ended 17 December 2021**

On 20 December 2021, Cabinet made the following decisions on the work of the Cabinet External Relations and Security Committee for the period ended 17 December 2021:

ERS-21-MIN-0050   **Negotiating Mandate for New Treaty on  
Cybercrime**   **CONFIRMED**  
Portfolio: Foreign Affairs

Proactively Released by the  
Minister of Foreign Affairs

Michael Webster  
Secretary of the Cabinet

Proactively Released by the  
Minister of Foreign Affairs



# Cabinet External Relations and Security Committee

## Minute of Decision

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### Negotiating Mandate for New Treaty on Cybercrime

**Portfolio**                      **Foreign Affairs**

On 14 December 2021, the Cabinet External Relations and Security Committee:

- 1        **noted** that the first session of negotiations for the draft text of a new international convention on cybercrime commences in January 2022, with negotiations scheduled to last at least two years;
- 2        **noted** that the Ministry of Foreign Affairs and Trade will lead New Zealand's negotiating team, with support from the National Cyber Policy Office (Department of the Prime Minister and Cabinet), the Ministry of Justice, the Department of Internal Affairs, New Zealand Police, Crown Law Office and CERT NZ;
- 3        **noted** that the Minister of Foreign Affairs will provide progress updates to Cabinet as appropriate;
- 4        **authorised** the Minister of Foreign Affairs, Attorney-General, Minister Responsible for the GCSB, Minister of Police, Minister of Justice, and Minister for the Digital Economy and Communications to approve updates to the negotiation instructions as required;
- 5        **noted** that:
  - 5.1       officials have undertaken initial consultation with interested stakeholders, including representative of Māori, on draft principles and objectives for Aotearoa New Zealand's engagement in the negotiations;
  - 5.2       the input from this consultation, as well as that received through public submissions, has been reflected in the proposed mandate;
- 6        **noted** that officials will continue to undertake targeted consultation throughout the negotiations;
- 7        **agreed** that Aotearoa New Zealand seek a treaty that:
  - 7.1       is 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;
  - 7.2       includes the provision of support and technical assistance for all States to develop capacity and capability to respond to these challenges;

- 8 **agreed** that Aotearoa New Zealand's starting point, when considering questions of scope, be that the new instrument is:
- 8.1 complementary rather than conflicting with existing instruments, such as the Council of Europe Convention on Cybercrime (the Budapest Convention) and existing mutual legal assistance and information sharing obligations;
  - 8.2 consistent with human rights obligations;
  - 8.3 modern, harmonised and a global framework to address and improve international responses to cybercrime;
  - 8.4 narrowly focused on core cybercrime issues and access to digital evidence;
- 9 **agreed** that Aotearoa New Zealand be guided by the following principles:
- 9.1 respect for the interests and potential impact on Māori and indigenous peoples internationally;
  - 9.2 support and enable Pacific Island Country participation in the negotiations, with Aotearoa New Zealand advocating for their interests and objectives where it is appropriate;
  - 9.3 advocate for universal implementation, with capacity building and technical assistance a key focus;
- 10 **agreed** that, in terms of methodology, Aotearoa New Zealand approach the negotiations:
- 10.1 in an inclusive manner, seeking broad Member State and multi-stakeholder participation;
  - 10.2 by establishing and working in close cooperation with a broad coalition of likeminded partners;
  - 10.3 using best endeavours to reach consensus with a view to securing the strongest, possible mandate;
- 11 **agreed** that Aotearoa New Zealand's initial engagement on substantive issues be guided by the principles articulated above <sup>s6(a), s9(2)(j)</sup>

Janine Harvey  
Committee Secretary

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**Present:**

Rt Hon Jacinda Ardern (Chair)  
Hon Grant Robertson  
Hon Kelvin Davis  
Hon Andrew Little  
Hon Nanaia Mahuta  
Hon Poto Williams  
Hon Kris Faafoi  
Hon Peeni Henare  
Hon Kiri Allan  
Hon Dr David Clark

**Officials present from:**

Office of the Prime Minister  
Officials Committee for ERS

Office of the Minister of Foreign Affairs  
Chair, Cabinet External Relations and Security Committee (ERS)

## Negotiating mandate for new treaty on Cybercrime

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### Proposal

1. This paper seeks approval of a mandate for formal negotiations on a new international convention on cybercrime.

### Executive summary

2. In 2019, UN Member States adopted resolution 74/247 establishing a process to negotiate a new international convention on cybercrime.<sup>1</sup>
3. The new convention is intended to counter the use of information and communications technologies for criminal purposes, taking into consideration existing international instruments related to cybercrime and efforts undertaken at the national, regional and international levels.
4. This paper seeks approval of a mandate for the formal negotiations, which commence in January 2022 and are scheduled to last at least two years.
5. Officials have undertaken initial consultation with interested stakeholders, including representatives of Māori, on draft principles and objectives for Aotearoa New Zealand's engagement in the negotiations. Key themes included the need to consult and include Māori and indigenous rights and interests; to build on and complement the Council of Europe Convention on Cybercrime (the "Budapest Convention"); to uphold human rights; as well as take a multi-stakeholder approach. The input from this consultation, as well as that received through public submissions, has been reflected in this paper. Officials will continue to undertake targeted consultation throughout the negotiations.
6. In line with the feedback received, I propose that Aotearoa New Zealand's overarching goal for the negotiations 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.
7. For New Zealand it is important that this goal is achieved in a manner that does not undermine existing instruments, is narrow in scope and informed by multi-stakeholder engagement, protects human rights, factors in Māori interests and the interests of indigenous peoples internationally, and supports the interests and objectives of the Pacific.
8. Pursuant to this goal, I propose New Zealand's objectives are to seek a treaty that:

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<sup>1</sup> Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes

- 8.1. Complements existing international rules and norms, including the Budapest Convention, and does not duplicate unnecessarily work done elsewhere;
  - 8.2. Is consistent with international human rights obligations and contains strong safeguards to protect the right to freedom of expression and the right not to be subjected to arbitrary and unlawful interference with privacy;
  - 8.3. Is narrowly focused on cyber-dependent offences, together with cyber-enabled crimes where the scale, scope and speed of the offence is increased by use of a computer, and does not stray into cyber security issues more broadly;
  - 8.4. Enables expeditious preservation and access to digital evidence subject to international human rights and legal protections;
  - 8.5. Considers the interests of and potential impact on Māori and indigenous peoples internationally; as well as the interests of our region, the Pacific;
  - 8.6. Is informed by multi-stakeholder perspectives and insights to ensure the instrument is informed by best practice; and
  - 8.7. Is technology neutral and future-proofed.
9. The Ministry of Foreign Affairs and Trade will lead New Zealand's negotiating team, with support from the National Cyber Policy Office (Department of Prime Minister and Cabinet), the Ministry of Justice, the Department of Internal Affairs, New Zealand Police, Crown Law Office and CERT NZ.
  10. Cabinet will be updated on progress as appropriate. I recommend that the Minister of Justice, Minister of Police and the Minister for the Digital Economy and Communications alongside myself are given delegated authority to approve updates to negotiating instructions as required.

## Background

11. Cybercrime is a transboundary challenge. Global cooperation rooted in an inclusive and multi-stakeholder approach is the only way to ensure that the international community is able to effectively counter this growing threat. A majority of UN member states consider that the current international rules around cybercrime are inadequate; elements have not kept up to-date with technological change and the increasing importance of digital evidence.
12. In response to this, on 27 December 2019, the UN General Assembly adopted resolution 74/247 establishing a process to negotiate a new international convention on cybercrime. The strong support this resolution received reflected the widespread view that new rules were required to facilitate greater international cooperation in the increasingly complex fight against cybercrime.
13. s6(a), s9(2)(j)

s6(a), s9(2)(j)

14.

15. Substantive negotiations are due to commence in January 2022 and conclude in 2024. At least six negotiation sessions of two weeks will occur to elaborate the new convention, with sessions alternating between New York and Vienna. At this stage it looks likely that hybrid options will also facilitate some virtual participation.

16. <sup>s6(a)</sup>

If a new treaty is agreed at the international level, there would still be a separate domestic process for Parliament to consider the treaty before it is ratified.

#### **Comment**

17. Addressing cybercrime and cyber-enabled is a priority for Aotearoa New Zealand and the broader Pacific region. Our region's increasing reliance on digital connectivity, something that has increased during the COVID pandemic, has heightened the need to ensure cyber security. The frequency and severity of attacks by malicious actors has increased significantly over the past year and effective cyber security is critical to our economic and security resilience.
18. Aotearoa 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. Aotearoa 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).
19. Participation in the negotiations for the new convention will help us fulfil the vision and values set out in the 2019 Cyber Security Strategy Vision: *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 will also support the delivery of two of the Strategy's five priority areas to improve cyber security, "proactively tackle cybercrime" and "internationally active".

#### **Domestic consultation**

20. A short, targeted, initial public consultation on a set of draft principles and objectives for New Zealand's engagement in the negotiations was conducted with interested Māori, industry, and civil society stakeholders from 8 September to 6 October 2021. This was supplemented by an online consultation platform, hosted on DPMC's website, seeking public submissions.

21. Officials received 13 submissions from a range of stakeholders and conducted a number of more detailed discussions with some of this group. The principles outlined in this paper reflect these consultations. The key feedback contained in these submissions included:
- 21.1. Support for Aotearoa New Zealand's engagement in the negotiations given the importance and relevance of the impacts of cybercrime in Aotearoa New Zealand, accompanied by caution that some key states will seek to use the negotiations to advance positions that do not align with New Zealand's interests and values;
  - 21.2. The importance of the fullest possible consultation with Māori, including on the issue of data sovereignty;
  - 21.3. The importance of inclusion of Māori and indigenous rights and interests more generally;
  - 21.4. Wide support for the idea that the new universal convention process not conflict or undermine the (narrower) Budapest Convention process. This included the view that the new convention should build on, and complement Budapest. This view was especially held by industry and civil society respondents;
  - 21.5. Strong support for the principle of taking a human rights based approach to the convention, including calls for explicit language regarding Aotearoa New Zealand's commitment to ensuring international human rights law is upheld in the negotiation process;
  - 21.6. A high level of support for the importance of multi-stakeholder engagement in the negotiation process, both at an international and domestic level;
  - 21.7. A variety of competing views on the value, or not, of regulation, and the scope of any regulation (i.e. whether it should include just states or also non-state actors such as industry or individuals); and
  - 21.8. A small number of technical suggestions for downstream consideration.
22. I propose that officials continue to undertake targeted consultation with interested stakeholders, including Māori during the negotiations. Officials will give consideration to possible mechanisms for doing this, including the option of establishing a reference group.

### ***New Zealand's overarching goal***

23. I propose that New Zealand's overarching goal for the new treaty 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.

### ***Scope, principles and methodology for the negotiation***

24. While the shape and scope of the new cybercrime convention have not yet been confirmed by the negotiating parties, I propose Aotearoa New Zealand's starting point for considering the question of scope be:

24.1. *Complementary rather than conflicting:* The new instrument sought should not conflict with or erode existing instruments, such as the Budapest Convention, and existing mutual legal assistance and information sharing obligations, but rather take them into account and build on them where appropriate.<sup>s6(a), s9(2)(j)</sup>

24.2. *Consistent with human rights obligations:* Aotearoa New Zealand will advocate for any Convention to be consistent with states' obligations to protect and respect human rights online, including the right to freedom of expression and the right not to be subjected to arbitrary and unlawful interference with privacy. We will recognise the impact of cybercrime on victims and consider their interests in our approach to negotiations.

24.3. *Modern, harmonised and global framework:* The new instrument should seek to address and improve international responses to cybercrime and cyber-enabled crime, including through improved access to digital evidence to facilitate the prosecution of a wide range of offences, subject to human rights and legal protections. We will advocate for any eventual convention to be practical, technology-neutral and future-proofed to the extent possible.

24.4. *Narrowly focussed:* Aotearoa New Zealand will advocate to keep negotiations targeted on core cybercrime issues and access to digital evidence, rather than expanding scope to cover broader cyber security matters which take place elsewhere in other UN processes. New Zealand will support consideration of wider cyber-enabled crimes where the scale, scope and speed of the offence is increased by use of a computer. New Zealand will not support the inclusion of legitimate online conduct (like political speech) as cybercrimes.

25. In addition, I propose Aotearoa New Zealand be guided by the following principles in the negotiations:

25.1. *Māori interests and Te Tiriti:* The new instrument should consider the interests and potential impact on Māori and indigenous peoples internationally. Aotearoa New Zealand will consider and provide for Māori interests, the Crown's Treaty of Waitangi relationship and the potential impact on Māori of issues arising in the negotiation process, including through ongoing engagement with Māori stakeholders as the negotiation progresses.

25.2. *Engages and advocates for Pacific interests:* Aotearoa New Zealand will seek to encourage and support Pacific Island Country participation and advocate for their interests and objectives where it is necessary, appropriate and required.

- 25.3. *Universal implementation:* Aotearoa New Zealand will advocate for capacity building and technical assistance to be a key focus of discussions to support all member states' ability to implement any eventual convention.
26. In terms of methodology, I propose that Aotearoa New Zealand:
- 26.1. *Broad and multi-stakeholder participation:* Seeks and encourages an inclusive process that supports broad Member State and multi-stakeholder participation in the negotiations to ensure a more meaningful instrument as well as greater buy-in.
  - 26.2. *Establish coalitions of likeminded partners:* We will advocate for our interests, and work in close cooperation with a broad coalition of likeminded international partners (on substance, approach to negotiations, as well as outreach).
  - 26.3. *Push for universality:* We will use best endeavours to reach consensus with a view to securing the strongest-possible mandate for the convention (recognising that given the transnational nature of cybercrime, any new convention should reflect the consensus of all Member States in order to facilitate effective international cybercrime cooperation).

### **Substantive Issues**

27. Negotiating parties are still considering the scope and objectives of a treaty. This means that it is not yet clear what substantive issues will be covered by negotiations. International discussions of cybercrime in other fora, combined with the preparatory processes associated with these negotiations provide a steer on the areas that are likely to be key focusses of discussion in the initial phase. These include:
- 27.1. *Scope of conduct to be criminalised in states' domestic legal systems.* This will be a key point of contention in the discussions. As articulated in the principle above I propose that New Zealand's position be that cybercrime should be defined as *cyber-dependent* crimes (crimes that require an ICT system to be committed, such as ransomware attacks) and *cyber-enabled* crimes where the scale, scope and speed of the offence is increased by use of a computer. New Zealand would not support the inclusion of offences that could be used to target political speech and dissent online.
  - 27.2. *States' obligations regarding international law enforcement, including extradition, information sharing and mutual legal assistance.* New Zealand considers the Convention should enhance international law enforcement cooperation to disrupt, investigate and prosecute cybercrime offences, and should facilitate access to digital evidence held in other states in particular. However, such obligations needs to be subject to existing grounds for refusing to extradite or provide assistance, and safeguards in respect of human rights. For example, states should be able to refuse to extradite or provide assistance to another state where it considers the prosecution is politically motivated or there are fair trial concerns, or where New Zealand does not recognise the offence under domestic law.

- 27.3. *Territorial jurisdiction to prosecute cyber offences.* Traditional models of territorial jurisdiction (meaning states are responsible for prosecuting offences which are committed in their territory) do not translate effectively to cybercrime, as the perpetrator, victims and ICT systems used to commit the offence may be located in different jurisdictions.
- 27.4. *Access to data across jurisdictions.* There will likely be a discussion around the circumstances in which a jurisdiction may unilaterally access data stored in another jurisdiction. <sup>s6(a), s9(2)(j)</sup>
- 27.5. *Other issues likely to feature* include questions about recovery of the proceeds of cybercrime and how to provide capacity and capability development to all states.
28. For all these issues and other questions of substance I propose that New Zealand's initial engagement on these issues be guided by the principles articulated above <sup>s6(a), s9(2)(j)</sup>

### **Next steps**

29. I recommend that the Attorney-General, Minister for Police, Minister of Justice, and the Minister for the Digital Economy and Communications alongside myself are given delegated authority to approve updates to negotiating instructions as required.

### **Consultation**

30. The following agencies were involved in development of this paper: the Ministry of Foreign Affairs and Trade (MFAT), the Department of the Prime Minister and Cabinet (DPMC), Ministry of Justice (MoJ), Department of Internal Affairs (DIA), Crown Law, NZ Police, Te Arawhiti, and the Ministry of Business, Innovation and Employment (CERT NZ).

### **Financial implications**

31. The financial implications for Aotearoa 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.

### **Human rights**

32. There are no expected inconsistencies with the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990. 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.

### Legislative implications

33. Given the early stage of the negotiations, it is difficult to predict the shape of any final treaty and the likely form and content of any implementing legislation which might be required. If implementing legislation is required, Cabinet would be informed of this in a paper seeking approval to ratify or accede to the treaty.

### Regulatory impact analysis

34. 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 party to a new treaty.

### Proactive Release

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

### Recommendations

The Minister of Foreign Affairs recommends that the Committee:

1. **Note** the first session of negotiations for the draft text of a new international convention on cybercrime commences in January 2022, with negotiations scheduled to last at least two years.
2. **Note** the Ministry of Foreign Affairs and Trade will lead New Zealand's negotiating team with support from National Cyber Policy Office (Department of Prime Minister and Cabinet), the Ministry of Justice, the Department of Internal Affairs, New Zealand Police, Crown Law Office and CERT NZ.
3. **Note** Cabinet will be updated on progress when appropriate.
4. **Agree** that the Attorney-General, Minister for Policy, Minister of Justice, and Minister for the Digital Economy and Communications alongside myself are given powers to act to approve updates to negotiation instructions as required.
5. **Note** officials have undertaken initial consultation with interested stakeholders, including representative of Māori, on draft principles and objectives for Aotearoa New Zealand's engagement in the negotiations. The input from this consultation, as well as that received through public submissions, has been reflected in this paper.
6. **Note** officials will continue to undertake targeted consultation throughout the negotiations.
7. **Agree** that Aotearoa New Zealand seek a treaty that is:
  - 7.1. 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.

8. **Agree** that Aotearoa New Zealand's starting point, when considering questions of scope, be that the new instrument is:
  - 8.1. Complementary rather than conflicting with existing instruments, such as the Budapest Convention and existing mutual legal assistance and information sharing obligations;
  - 8.2. Consistent with human rights obligations;
  - 8.3. Modern, harmonised and a global framework to address and improve international responses to cybercrime; and
  - 8.4. Narrowly focused on core cybercrime issues and access to digital evidence.
9. **Agree** that Aotearoa New Zealand be guided by the following principles:
  - 9.1. Respect for the interests and potential impact on Māori and indigenous peoples internationally;
  - 9.2. Support and enable Pacific Island Country participation in the negotiations, with Aotearoa New Zealand advocating for their interests and objectives where it is appropriate ;and
  - 9.3. Advocate for universal implementation, with capacity building and technical assistance a key focus.
10. **Agree** that, in terms of methodology, Aotearoa New Zealand approach the negotiations:
  - 10.1. In an inclusive manner, seeking broad Member State and multi-stakeholder participation;
  - 10.2. by establishing and working in close cooperation with a broad coalition of likeminded partners; and
  - 10.3. using best endeavours to reach consensus with a view to securing the strongest, possible mandate.
11. **Agree** that Aotearoa New Zealand's initial engagement on substantive issues be guided by the principles articulated above <sup>s6(a), s9(2)(j)</sup>

Authorised for lodgement

Hon Nanaia Mahuta  
Minister of Foreign Affairs