

INTERCEPTION OF COMMUNICATIONS BILL, 2006

Differences between original Bill HB 4, 2006, gazetted on 26th May, 2006, and new consolidated text substituted by resolution of House of Assembly on 7th November, 2006

House of Assembly Votes & Proceedings for 7th November, 2006, recorded approval of the following motion moved by the Minister of Justice, Legal and Parliamentary Affairs:–

"That the present text of the Interception of Communications Bill (H.B. 4, 2006) currently on the Order Paper be withdrawn and be replaced by a new consolidated text of the bill in terms of Standing Order No. 128 and that the new bill be treated as having been introduced in terms of Standing Order No. 103 and referred to the Parliamentary Legal Committee."

Earlier, Press reports had predicted that there would be a new text designed to meet constitutional objections to the original Bill identified by the Parliamentary Legal Committee and drawn to the attention of the responsible Minister. The Committee's report on the new consolidated text is yet to be presented.

The new consolidated text of the Bill differs from the original H.B. 4, 2006 in several respects, as follows:–

- **clause 2 (Interpretation)** - definition of "interception subject" or "target" omitted, definition of "organised criminal group" inserted and definition of "serious offence" rewritten
- **clause 6 (Issue of warrant)** – in subsection (1) paragraph (a) has been rewritten and paragraph (d) has been omitted. The original subclause (2) permitting unwritten urgent applications has also been omitted.
- **clause 7 (Scope of warrant renewal thereof)** – renewal of a warrant is handled differently (involving the Attorney-General and the Administrative Court in certain circumstances)
- **clause 12 (Interception capability of telecommunication service)** – in subclause (b) the words "with this section and" have been omitted
- **clause 13 (Compensation payable to service provider or protected information key holder)** – the order of subclauses (2) and (3) has been reversed.
- **clause 18 (Appeals)** – there will be no appeal to the Minister; appeals will go to the Administrative Court
- **clause 19 (Review of exercise of Minister's powers under this Act)** – new clause, providing for annual review by the Attorney-General of the Minister's use of his power to issue warrants for interception of communications

The following table sets out extracts from both texts in order to facilitate comparison of the old and new. New wording is emphasised by use of underlining and bold font. Endnotes contain further material to assist the reader in assessing the effect of references to the Criminal Procedure and Evidence Act [*Chapter 9:07*] and the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*].

Clause 2 – Interpretation of terms

“organised criminal group” means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious offences in order to obtain, directly or indirectly, a financial or other material benefit;¹

"serious offence" has the meaning given to that term by the Serious Offences (Confiscation of Profits) Act [Chapter 9:17];

“serious offence” means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

Clause 6 – Issue of warrant

(1) A warrant shall be issued by the Minister to an authorised person referred to in section 5 if there are reasonable grounds for the Minister to believe that-

- (a) a serious offence has been or is being or will probably be committed; or
- (b) the gathering of information concerning an actual threat to national security or to any compelling national economic interest is necessary; or
- (c) the gathering of information concerning a potential threat to public safety or national security is necessary; or
- (d) there is a threat to the national interest involving the State's international relations or obligations.

(2) In the case of urgency or the existence of exceptional circumstances, an oral application may be made to the Minister by the authorised person if he or she is of the opinion that it is not reasonably practicable to make a written application, but in such case a formal application in terms of this Part shall be lodged as soon as possible thereafter with the Minister.

(3) The Minister may, if he or she is of the opinion that the circumstances so require-

- (a) upon an application being made in terms of this Part, issue instead of a warrant any directive to a service provider not involving any interception or monitoring of communications; or
- (b) after a warrant has been issued, amend or revoke the warrant.

(1) A warrant shall be issued by the Minister to an authorised person referred to in section 5 if there are reasonable grounds for the Minister to believe that—

- (a) any of the following offences has been or is being or will probably be committed—
 - (i) a serious offence **by an organised criminal group;** or
 - (ii) **an offence referred to in the Third Scheduleⁱⁱ or the Ninth Scheduleⁱⁱⁱ to the Criminal Procedure and Evidence Act [Chapter 9:07];**
- (b) the gathering of information concerning an actual threat to the national security or to any compelling national economic interest is necessary; or
- (c) the gathering of information concerning a potential threat to public safety or national security is necessary.

(2) The Minister may, if he or she is of the opinion that the circumstances so require—

- (a) upon an application being made in terms of this Part, issue instead of a warrant any directive to a service provider not involving any interception or monitoring of communications; or
- (b) after a warrant has been issued, amend or revoke the warrant.

Clause 7 – Scope of warrant

A warrant shall-

- (a) be valid for such period not exceeding three months as may be specified therein but may, for good cause shown by the authorised person, be renewed for periods not exceeding one month at a time by the Minister; and
- (b) specify the name and address of the interception subject and the manner of interception;
- (c) order the service provider to strictly comply with such technical requirements as may be specified by the agency to facilitate the interception;
- (d) specify the apparatus and other means that are to be used for identifying the communication that is to be intercepted;
- (e) contain any other necessary details relating to the interception target.

Scope of warrant and renewal thereof

(1) A warrant shall—

- (a) subject to subsection (2), be valid for such period not exceeding three months as may be specified therein but may, for good cause shown by the authorised person, be renewed for a period not exceeding three months—
 - (i) **by the Minister in respect of a serious offence by an organised criminal group or for a purpose specified in section 6(1)(b) or (c);**
 - (ii) **by the Minister in consultation with the Attorney-General in respect of an offence referred to in the Third Schedule or the Ninth Schedule to the Criminal Procedure and Evidence Act [Chapter 9:07];**
- (b) specify the name and address of the interception subject and the manner of interception;
- (c) order the service provider to strictly comply with such technical requirements as may be specified by the agency to facilitate the interception;
- (d) specify the apparatus and other means that are to be used for identifying the communications that is to be intercepted;
- (e) contain any other necessary details relating to the interception target.

(2) Upon expiry of a warrant that is renewed in terms of subsection (1)(a)(i) or (ii) or within six months of such expiry, the warrant may, for good cause shown by the authorised person, be renewed for a further period not exceeding three months—

- (a) **by the Minister in consultation with the Attorney-General in respect of a serious offence by an organised criminal group or for a purpose specified in section 6(1)(b) or (c);**
- (b) **by the Administrative Court upon an *ex parte* application by the authorised person concerned, in respect of an offence referred to in the Third Scheduleⁱⁱ above or the Ninth Scheduleⁱⁱⁱ above to the Criminal Procedure and Evidence Act [Chapter 9:07].**

(3) Upon expiry of a warrant that is renewed in terms of subsection (2)(b) or within six months of such expiry, the warrant may, for good cause shown by the authorised person, be renewed for a further period not exceeding three months by the Administrative Court upon an *ex parte* application by the authorised person concerned.

(4) Every renewal of a warrant that is sought within six months of the expiry of a warrant that

was renewed in terms of subsection (2)(a) or (3) or this subsection may be renewed for further periods not exceeding three months at a time by the Administrative Court upon an *ex parte* application by the authorised person concerned.

(5) An authorised person shall notify the Minister in advance and in writing of any application for the renewal of a warrant in terms of subsection (2)(b), (3) or (4).

Clause 12 – Interception capability of telecommunication service

(5) Subject to section 13, any cost incurred by a telecommunication service provider under this Act for the purpose of—

- (a) enabling—
 - (i) a telecommunication service to be intercepted; and
 - (ii) call-related information to be stored;
- and
- (b) complying with this section and section 9;

shall be borne by the telecommunication service provider.

(5) Subject to section 13, any cost incurred by a telecommunication service provider under this Act for the purpose of—

- (a) enabling—
 - (i) a telecommunication service to be intercepted; and
 - (ii) call-related information to be stored;
- and
- (b) **complying with section 9;**

shall be borne by the telecommunication service provider.

Clause 18 – Appeals

(1) Any person who is aggrieved by a warrant, directive or order issued to or by the Authority, authorised person or the agency may appeal **to the Minister** within fourteen days after being notified of it, and the Minister may confirm, vary or set aside the warrant, directive or order appealed against or give such other directions in the matter as he or she thinks appropriate.

(2) Any person who is aggrieved by a decision made by the Minister in terms of subsection (1) may appeal against it to the Administrative Court within one month after being notified of the decision.

(3) The Administrative Court may in any appeal confirm, vary or set aside the decision appealed against and may make such order as to costs as it thinks just.

(1) Any person who is aggrieved by a warrant, **a directive referred to in section 6(2)(a)** or a directive or order issued to or by the Authority, an authorised person or the agency may appeal against it **to the Administrative Court within one month of being notified or becoming aware of it, as the case may be.**

(2) The Administrative Court may in any appeal confirm, vary or set aside the warrant, directive or order appealed against and may make such order as to costs as it thinks fit.

(3) **For the avoidance of doubt, the Administrative Court is an “adjudicating authority” for the purposes of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04] when considering any appeal in terms of this section.**^{iv}

No equivalent in original Bill

Clause 19 – Review of exercise of Minister's powers under this Act

(1) No later than three months after the end of each calendar year the Minister shall submit for review by the Attorney-General a written summary of the particulars of every warrant which, during that calendar year, was issued by him or her but not renewed in terms of section 7(1)(a)(i) or (ii), (2), (3) or (4).

(2) On receiving the summary referred to in subsection (2) the Attorney-General may request further particulars in relation to any warrant mentioned in the summary, and the Minister shall comply as soon as practicable with any such request.

(3) Upon reviewing the summary referred to in subsection (2), together with any further particulars provided in compliance with subsection (3), the Attorney-General may make recommendations in writing to the Minister concerning the manner in which the Minister shall exercise his or her powers in future generally or with respect to the issuance of any class of warrant, and the Minister shall comply with such recommendations.

ⁱ This new term is used in clauses 6(1)(a)(i); 7(1)(a)(i); and 7(2)(a).

ⁱⁱ The Third Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] lists OFFENCES IN RESPECT OF WHICH POWER TO ADMIT PERSONS TO BAIL IS EXCLUDED OR QUALIFIED.

The **current list** (to be replaced when the Criminal Procedure and Evidence Amendment Act, 2006, becomes law) is:–

1. Treason.
2. Murder.
3. Rape.
4. Robbery accompanied by the use of a firearm or lethal weapon.
5. Kidnapping.
6. Arson.
7. Theft of a motor vehicle as defined in section 2 of the Road Traffic Act [*Chapter 13:11*].
8. A conspiracy, incitement or attempt to commit any offence referred to in paragraph 5 or 6.
9. Any offence where the Attorney-General has notified a magistrate of his intention to indict the person concerned in terms of subsection (1) of section one hundred and one or subsection (1) of section one hundred and ten.
10. Contravening section five, six, seven, eight, nine, ten or eleven of the Public Order and Security Act [*Chapter 11:17*].

Once the Criminal Procedure and Evidence Amendment Act, 2006, becomes law the list will be as follows:–

PART I

Murder, where—

- (a) it was planned or premeditated; or
 - (b) the victim was—
 - (i) a law enforcement officer or public prosecutor performing his or her functions as such, whether on duty or not, or a law enforcement officer or public prosecutor who was killed by virtue of his or her holding such a position; or
 - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in the First Schedule;
- or

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences—

- (i) rape; or
 - (ii) aggravated indecent assault; or
 - (iii) robbery with aggravating circumstances;
- or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape or aggravated indecent assault—

(a) when committed—

- (i) in circumstances where the victim was raped or indecently assaulted more than once, whether by the accused or by any co-perpetrator or accomplice; or
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; or
 - (iii) by a person who is charged with having committed two or more offences of rape or aggravated indecent assault; or
 - (iv) by a person who knew that he or she had the acquired immune deficiency syndrome or the human immunodeficiency virus;
- or

(b) where the victim—

- (i) is a girl or boy under the age of 16 years; or
- (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;
- (iii) is mentally disordered or intellectually handicapped, as defined in section 2 of the Mental Health Act [Chapter 15:12] (No. 15 of 1996);

(c) involving the infliction of grievous bodily harm.

Robbery, involving—

- (a) the use by the accused or any co-perpetrators or participants of a firearm; or
- (b) the infliction of grievous bodily harm by the accused or any co-perpetrators or participants; or
- (c) the taking of a motor vehicle as defined in section 2 of the Road Traffic Act [Chapter 13:11].

Indecent assault of a child under the age of 16 years, involving the infliction of grievous bodily harm.

Kidnapping or unlawful detention involving the infliction of grievous bodily harm.

Contravening section 20, 21, 22, 23, 24, 25, 26, 27 or 29 of the Criminal Law Code.

An offence referred to in Part II—

- (a) where the accused has previously been convicted of an offence referred to in that Part or this Part; or
- (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in that Part or this Part.

Part II

Treason or concealing treason.

Murder otherwise than in the circumstances referred to in paragraph 1 of Part I.

Attempted murder involving the infliction of grievous bodily harm.

Malicious damage to property involving arson.

Theft of a motor vehicle as defined in section 2 of the Road Traffic Act [Chapter 13:11].

Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, or the possession of an automatic or semi-automatic firearm, explosives or armaments.

A conspiracy, incitement or attempt to commit any offence referred to in paragraph 4, 5 or 6.

Any offence where the Attorney-General has notified a magistrate of his intention to indict the person concerned in terms of section 66.

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The Ninth Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*], headed OFFENCES INVOLVING CORRUPTION, ORGANISED CRIME OR HARM TO THE NATIONAL ECONOMY, lists the following offences:—

1. Contravening the Prevention of Corruption Act [Chapter 9:16].
2. Contravening section 63 (“Money-laundering”) of the Serious Offences (Confiscation of Profits) Act [Chapter 9:17].
3. The sale, removal or disposal outside Zimbabwe of any controlled product in contravention of the Grain Marketing Act [Chapter 18:14].
4. Any offence under any enactment relating to the unlawful possession of, or dealing in, precious metals or precious stones.
5. Any offence under any enactment relating to the unlawful dealing in habit-forming drugs.

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6. Contravening section 42 (“Offences relating to banknotes”) of the Reserve Bank of Zimbabwe Act [Chapter 22:15] or committing any offence relating to the coinage.
 7. Contravening subparagraph (i) of paragraph (a) of subsection (1) of section 5 of the Exchange Control Act [Chapter 22:05] as read with—
 - (a) subsection (1) of section 4 of the Exchange Control Regulations, 1996, published in Statutory Instrument 109 of 1996 (in this paragraph and paragraph 8 called “the Exchange Control Regulations”), by dealing in any foreign currency in contravention of paragraph (a) or (b) of that provision of the Regulations without the permission of an exchange control authority;
 - (b) subsection (1) of section 10 of the Exchange Control Regulations, by unlawfully making any payment, placing any money or accepting any payment in contravention of paragraph (a), (b), (c) or (d) of that provision of the Regulations;
 - (c) paragraph (a) or (b) of subsection (1) of section 11 of the Exchange Control Regulations, by unlawfully making any payment outside Zimbabwe or incurring an obligation to make any payment outside Zimbabwe;
 - (d) paragraph (b), or (f) of subsection (1) of section 20 of the Exchange Control Regulations, by unlawfully exporting any foreign currency, gold, silver or platinum, or any article manufactured from or containing gold, silver or platinum, or any precious or semiprecious stone or pearl from Zimbabwe;
 - (e) subsection (2) of section 21 of the Exchange Control Regulations, by unlawfully exporting any goods from Zimbabwe in contravention of that provision of the Regulations.
 8. Contravening paragraph (b) of subsection (1) of section 5 of the Exchange Control Act [Chapter 22:05] by making any false statement or producing any false document in connection with a contravention of subsection (2) of section 21 of the Exchange Control Regulations.
 9. Theft of a motor vehicle as defined in section 2 of the Road Traffic Act [Chapter 13:11].
 10. Theft or forgery of—
 - (a) a document issued to a person in terms of subsection (1) or (2) of section 7 of the National Registration Act [Chapter 10:17], or a passport or drivers licence issued by or on behalf of the Government of Zimbabwe; or
 - (b) any visitors entry certificate or other certificate or permit issued to a person in terms of the Immigration Act [Chapter 4:02], or in terms of any enactment relating to refugees; or
 - (c) any passport, identity document or drivers licence issued by a foreign government; or
 - (d) a vehicle registration plate; or
 - (e) any documentation relating to the registration or insurance of a motor vehicle.
 11. Theft of a bovine or equine animal.
 12. A conspiracy, incitement or attempt to commit any offence referred to in paragraphs 1 to 11.

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The Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*] requires a court to restrict attendance at and publication of proceedings "whenever the court ... is satisfied that it is necessary or expedient to do so in the interests of defence, public safety, public order or the economic interests of the State".