

Chapter 272.

Protection of Private Communications Act 1973.

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INDEPENDENT STATE OF PAPUA NEW GUINEA.



Chapter 272.

Protection of Private Communications Act 1973.

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INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

Protection of Private Communications Act 1973,

Being an Act to provide protection for private communications, and define—

- (a) the circumstances in which private communications may be intercepted; and
- (b) the use that may be made of information obtained by such interceptions, and for related purposes.

PART I. – PRELIMINARY.

1A. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

¹This Act, to the extent that it regulates or restricts a right or freedom referred to in Part III.3.C (*qualified rights*) of the *Constitution*, namely—

- (a) the right to freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and
- (b) the right to freedom of conscience, thought and religion conferred by Section 45 of the *Constitution*; and
- (c) the right to freedom of expression and publication conferred by Section 46 of the *Constitution*; and
- (d) the right to privacy conferred by Section 49 of the *Constitution*,

is a law that is made for that purpose.

1. INTERPRETATION.

- (1) In this Act, unless the contrary intention appears—

¹ Section 1A added by No. 24 of 1984, s1.

“communication” includes conversation, message and signal, and any part of a conversation, message or signal;

“Director-General” means the Director-General of the National Intelligence Organization;

“interception”, in relation to a communication, means the act of overhearing, recording, monitoring or listening in to the communication by—

(a) a person who is not a party to the communication; or

(b) a party to the communication without the consent of another party;

“national security” means the protection of Papua New Guinea from acts of espionage, sabotage or subversion, whether directed from, or intended to be committed within, the country or elsewhere;

“private communication”, means, subject to Subsection (2), a communication from one person to another or between a number of persons such that, or in circumstances such that, it is intended only for them, or for them and other persons with their consent, but does not include any such communication made without taking reasonable precautions to prevent interception other than prohibited interception;

“prohibited interception” means the interception of a communication that is prohibited by Section 3, without taking into account any defence provided by Part III. or any other law;

“the regulations” means any regulations made under this Act;

“secret listening device” means any instrument, apparatus, equipment or device used, or designed, intended or adapted for use, for the interception of a private communication without the knowledge of a party to the communication;

“telecommunications” means communications of signs, signals, data, writing, facsimiles or sounds, of any kind, by any systems or processes of electric or electromagnetic transmission;

“telecommunication system” means any system of telecommunications, whether private or public;

“vehicle” includes vessel or aircraft.

(2) For the purposes of this Act, a communication may be a private communication in relation to one party to the communication and not a private communication in relation to another party.

2. APPLICATION TO THE STATE.

This Act binds the State and all Departments and instrumentalities of the Government.

PART II. – PROTECTION OF PRIVACY.

3. PROTECTION OF PRIVACY OF CONVERSATIONS, ETC.

(1) Subject to this Act, a person who–

(a) uses a secret listening device to intercept or to attempt to intercept a private communication; or

(b) causes or permits a secret listening device to be so used,

is guilty of an offence.

Penalty: A fine not exceeding K2,000.00 or imprisonment for a term not exceeding 12 months, or both.

(2) Where a person is convicted of an offence against Subsection (1), the court that convicts him may order that any secret listening device used in or for the purpose of the commission of the offence be forfeited to the State.

4. USE OF ILLEGALLY INTERCEPTED COMMUNICATIONS.

Subject to this Act, a person who–

(a) divulges to another or publishes in any way any information obtained, to the knowledge of that person, by the prohibited interception of a private communication; or

(b) communicates any such information contrary to this Act,

is guilty of an offence.

Penalty: A fine not exceeding K2,000.00 or imprisonment for a term not exceeding 12 months, or both.

5. PROOF OF STATUTORY DEFENCES.

The burden of proof of a defence to a charge of an offence against Section 3 or 4, being a defence provided by Part III., is on the defendant.

6. ORDER FOR DESTRUCTION OF RECORDS OF INTERCEPTED PRIVATE COMMUNICATIONS.

(1) Subject to Subsection (2), on application–

(a) by a party to the communication that has been intercepted; or

(b) by any other interested person,

a Judge may order the destruction, in such manner as he directs, of–

(c) all or any records of a private communication that has been intercepted by means of a secret listening device; and

(d) all or any copies of or extracts from any such records.

(2) Subsection (1) does not apply to or in respect of private communications intercepted under a warrant under Section 14.

(3) A person who, without lawful excuse (proof of which is on him), refuses or fails to comply with an order under Subsection (1) is guilty of an offence.

Penalty: A fine not exceeding K2,000.00 or imprisonment for a term not exceeding 12 months, or both.

PART III. – DEFENCES.

7. ACCIDENTAL INTERCEPTION.

It is a defence to a charge of an offence against Section 3 if the interception was accidental or unintentional and–

- (a) in the case of the overhearing of a communication–the accused person–
 - (i) ceased to overhear the communication; or
 - (ii) interrupted the communication to advise one of the parties that the communication was being overheard,
 - immediately he realized that he was overhearing a private communication; or
- (b) in the case of the recording of a communication–the accused person destroyed the record immediately he realized that the recorded communication was a private communication.

8. CONSENT.

It is a defence to a charge of an offence against Section 3 or 4 if the interception or the divulging or publishing, as the case may be, was with the consent, express or implied, of all parties to the communication in question.

9. INTERCEPTION BY APPROVED DEVICES.

It is a defence to a charge of an offence against Section 3 or 4 in relation to a private communication if–

- (a) the communication was intercepted with the consent, express or implied, of one of the parties to the communication; and
- (b) the secret listening device used was of a type approved by the regulations as providing a distinctive warning signal to all parties that the communication was being intercepted, and the device was used in accordance with the regulations.

10. MONITORING, ETC., BY TELIKOM PNG LIMITED.

It is a defence to a charge of an offence against Section 3 if the interception was made in the course of, and for purposes reasonably necessary for, the installation, maintenance, testing, inspection or operation of telecommunications equipment by–

- (a) an officer, employee, consultant, contractor or agent of Telikom PNG Limited; or
- (b) a person authorized by Telikom PNG Limited; or

- (c) the owner or person in charge of the equipment or a person authorized by him.

11. INTERCEPTION OF TELEPHONE CALLS THREATENING AIRCRAFT, ETC.

It is a defence to a charge of an offence against Section 3 or 4 if—

- (a) the interception was made at the request, or with the consent, of the recipient or intended recipient of the communication or of the subscriber; and
- (b) the interception was made for the purpose of preventing the commission of an offence of any of the following natures or of obtaining evidence leading to a conviction for such an offence:—
 - (i) the making of threats to or of damage to aircraft and ships;
 - (ii) the making of threats to human life;
 - (iii) kidnapping for ransom.

12. OBSCENE, ETC., TELEPHONE CALLS.

(1) Notwithstanding this Act, a member of the Police Force or an officer of or employee of Telikom PNG Limited may, at the request or with the consent of—

- (a) a person who has received an obscene, abusive or threatening telephone call; or
- (b) the subscriber for a telephone service on which such a telephone call has been received or a person on his behalf,

intercept telephone calls coming in on a telephone service, but for the specific purpose only of—

- (c) preventing the making of such calls; or
- (d) obtaining evidence of the commission of offences of the nature of the making of obscene, abusive or threatening telephone calls.

(2) Evidence obtained as the result of an interception under Subsection (1) is admissible in evidence only in the hearing of a charge of an offence of the nature of the making of obscene, abusive or threatening telephone calls.

13. INTERCEPTION FOR SECURITY PURPOSES OR THE DETECTION OR PREVENTION OF SERIOUS OFFENCES.

²It is a defence to a charge of an offence against Section 3 if the interception was made by virtue of a warrant under—

- (a) Section 15, and in accordance with the conditions of the warrant and that section; or

² Section 13 replaced by No. 24 of 1984, s2.

- (b) Part VI of the *National Intelligence Organization Act 1984* and in accordance with the conditions of the warrant and of that Act.

PART IV. – WARRANTS FOR INTERCEPTION.

14³. [REPEALED.]

15. WARRANTS FOR INTERCEPTION FOR THE DETECTION OR PREVENTION OF SERIOUS OFFENCES.

(1) Where a Judge is satisfied–

(a) that there are reasonable grounds for believing that–

- (i) an offence that is punishable by death or imprisonment for a term of not less than seven years; or
- (ii) an offence that is of so serious a nature in the particular circumstances of the case that he considers that any invasion of privacy resulting from the use of a secret listening device would be justified in terms of public interest,

has been or is about to be committed; and

(b) that in all the circumstances the particular offence that has been or is about to be committed was or would be serious; and

(c) that–

- (i) other methods of investigation have been tried and have failed, or would because of the circumstances of the particular case be unlikely to succeed; or
- (ii) the urgency of the matter is such that it would be impracticable to carry out an investigation of the offence by other methods of investigation; and

(d) that there is good reason to believe that the interception is likely to result in a conviction or in the protection of life or property, or in the prevention of the offence,

the Judge may issue a warrant to the Commissioner of Police authorizing the interception of communications to or from a particular person, place or vehicle, or within a particular place or vehicle.

(2) An application for a warrant under Subsection (1) shall be made as prescribed by the Rules of Court of the National Court or as directed by a Judge in the particular case, and shall be heard *ex parte* and *in camera*, no notice or report relating to the application shall be published and no record of the application or of a warrant issued on it shall be available for search by any person except by direction of a Judge.

(3) A warrant under Subsection (1)–

(a) shall specify–

³ Sec. 14 Repealed by No. 24 of 1984, s3.

- (i) the person, place or vehicle the subject of the warrant; and
 - (ii) if the warrant is to be in force for a period of less than one month—the period for which, subject to earlier termination under this section, it is to be in force; and
 - (iii) the conditions (if any) to which it is subject; and
- (b) authorizes the interception of communications to which it relates by the Commissioner of Police or a person authorized by him, subject to—
- (i) the provisions of this section; and
 - (ii) such conditions and restrictions as the Judge specifies in the warrant, for the protection of privacy.
- (4) Subject to Subsection (5) a warrant under Subsection (1) remains in force—
- (a) until the end of such period as is specified in the warrant; or
 - (b) until the Commissioner of Police is satisfied that the justification for its issue has ceased,

whichever first occurs, but in any case ceases to be in force at the end of the period of one month after the date of issue.

(5) A Judge may withdraw a warrant issued under Subsection (1).

(6) The Commissioner of Police shall report to the Judge who issued the warrant or, if that Judge is not readily available, to some other Judge as to the result of interceptions under a warrant under Subsection (1)—

- (a) immediately after the warrant ceases to be in force; and
- (b) at such other times as a Judge directs.

(7) Subject to Section 18, any information obtained as a result of interceptions of private communications under a warrant under Subsection (1) may be communicated to a person other than a Judge, the Commissioner of Police or a person authorized by the Commissioner only for the purpose of the investigation or prosecution of an offence disclosed by the information, or by the information and any other available evidence.

(8) The record of a private communication intercepted under a warrant under Subsection (1) shall—

- (a) immediately be examined by the Commissioner of Police or a person authorized by him; and
- (b) unless it provides evidence of an offence of the nature referred to in Subsection (1)(a) and then to the extent that it does not provide such evidence, be immediately destroyed, together with all copies and extracts, in a manner approved by the Head of State, acting on advice.

(9) After a record is dealt with in accordance with Subsection (8), the remainder (if any) shall—

- (a) be kept, when not actually in use, in safe custody; and

- (b) be destroyed, together with all copies and extracts, in such manner as the Head of State, acting on advice, directs—
 - (i) immediately the Commissioner of Police is satisfied that it is no longer of use for the purpose for which it was obtained; or
 - (ii) when directed by the Judge,
 - unless it is in the custody of a court or is in the custody of the Public Prosecutor with a view to indictment.

16⁴. [REPEALED.]

17. EFFECT ON OTHER LAWS.

A warrant under Section 14 or 15 authorizes the interception of communications only, and does not otherwise affect the operation of, or excuse any person from the compliance with, any other law.

⁴ Sec. 16 Repealed by No. 24 of 1984 s4.

PART V. – EVIDENCE OF INTERCEPTED COMMUNICATIONS.

18. EVIDENTIARY VALUE OF INTERCEPTED COMMUNICATIONS.

(1) Subject to this section, evidence obtained by the interception of a communication is admissible for the same purposes and to the same extent as it would be if it had been obtained in any other way.

(2) A private communication that has been intercepted in circumstances such that Section 10 would provide a defence to a charge of an offence against Section 3 arising out of the interception is not admissible in evidence.

(3) A private communication that has been intercepted in circumstances such that Section 11 would provide a defence to a charge of an offence against Section 3 arising out of the interception is admissible in evidence against a person on a criminal charge only if the charge is a charge of an offence specified in Section 11.

(4) A private communication that has been intercepted under a warrant under this Act is admissible in evidence against a person on a criminal charge only if–

(a) the interception was made in accordance with the conditions of the warrant and of this Act; and

(b) the charge is a charge of an offence of a kind referred to in Section 15(1)(a), and in all the circumstances the particular offence is serious,

or if the charge is a charge of an offence specified in Section 11 or 12.

(5) Private communications intercepted otherwise than in circumstances in which Part III. would provide a defence to a charge under Section 3 arising out of the interception, and records of private communications which have not been destroyed as required by this Act, are not admissible in evidence for any purpose other than–

(a) a prosecution for an offence against this Act or any other offence–

(i) that is constituted by the interception or failure to destroy; or

(ii) of which the interception or failure to destroy is an element or is evidence, in whole or in part; or

(b) a civil proceeding–

(i) arising out of the interception or the failure to destroy, or the use or publication of information obtained by the interception; or

(ii) in which the fact of the interception, failure, use or publication is in issue.

(6) This section does not render inadmissible any evidence of an intercepted communication where the evidence is independent of the interception.

19. PRIVILEGED COMMUNICATIONS.

This Act does not render admissible in evidence any communication which would otherwise be inadmissible as a privileged communication.

20. VOIR DIRE.

(1) Where—

- (a) a record of an intercepted communication consists, in whole or in part, of a sound recording; and
- (b) it is necessary, in order to test its admissibility in any proceedings, that the recording be played over; and
- (c) it appears to the court or tribunal that the record may relate in part to persons or circumstances not involved in the proceedings,

the record shall be played over *in camera* for the purpose of testing its admissibility.

(2) If any part of the record is found to relate to persons or circumstances not involved in the proceedings, and to be irrelevant, the court or tribunal shall make such order as seems to it necessary to ensure that the contents are not divulged in or in connection with the proceedings.

PART VI. – MISCELLANEOUS.

21. POLICE CALLS.

Notwithstanding this Act or any other law, a member of the Police Force may intercept a communication directed to or from a police station, police headquarters or other police office, but evidence obtained by the interception is not admissible in evidence for any purpose except with the consent of the person to or from whom the communication was directed.

22. ASSISTANCE FROM TELIKOM PNG LIMITED.

(1) Notwithstanding any other law, where a warrant is issued under Section 14 or 15 authorizing the interception of private communications within the telecommunications system, all officers and employees of Telikom PNG Limited shall give all assistance necessary for giving effect to the warrant.

(2) Where the assistance of officers or employees of Telikom PNG Limited is or is likely to be required, details of the warrant and of the assistance required shall, as soon as practicable after the issuing of the warrant, be given to the Managing Director of Telikom PNG Limited by the Director-General or the Commissioner of Police, as the case may be.

23. CERTAIN LISTENING DEVICES PROHIBITED IMPORTS.

(1) The importation, otherwise than by or on behalf of the State, of secret listening devices of a type prescribed by the regulations for the purposes of this section, is prohibited.

(2) Secret listening devices imported contrary to Subsection (1) are prohibited imports within the meaning of the *Customs Act 1951*.

24. REGULATIONS.

The Head of State, acting on advice, may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Office of Legislative Counsel, PNG