

No. of 2010

VIRGIN ISLANDS

TELECOMMUNICATIONS (AMENDMENT) ACT, 2010

ARRANGEMENT OF SECTIONS

Section

1. Short title.
2. Section 90 repealed and substituted.
3. Sections 90A, 90B and 90C inserted.

I Assent

Governor
, 2010

VIRGIN ISLANDS

No. of 2010

A Bill for

An Act to amend the Telecommunications Act, 2006 (No. 10 of 2006).

[Gazetted , 2010]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title.

1. This Act may be cited as the Telecommunications (Amendment) Act, 2010.

Section 90
repealed and
substituted.
No. 10 of 2006

2. Section 90 of the Telecommunications Act, 2006 (hereinafter referred to as “the Principal Act”), is repealed and the following section is substituted:

“Interception of 90.(1)The Governor may, on the application of the Commissioner of Police or, in his or her absence, a police officer not below the rank of Police Assistant Commissioner of Police, issue an interception order authorising the Police Force to intercept communications carried on a public telecommunications network and requiring a service provider to give assistance, at its expense, to the Police Force for the purpose of giving effect to the interception order.

(2) The Governor shall not issue an interception order under subsection (1) unless he or she is satisfied that the interception order requested is reasonably justifiable in a democratic society

- (a) in the interests of defence, public safety or public order, or
- (b) for the prevention or detection of offences against the criminal law or the customs law.

(3) The Governor may issue a Code of Practice governing

- (a) applications for, and the issuance of, an interception order;
- (b) the duration and renewal of interception orders;
- (c) the modification and cancellation of interception orders;
- (d) the keeping of records relating to interception orders;
- (e) the disclosure, copying, storage and destruction of intercepted communications and records relating to interception orders;
- (f) the use of intercepted communications;
- (g) such other matters relating to interception orders and intercepted communications as are necessary or expedient.

(4) For the purposes of this section, a person intercepts a communication in the course of its transmission by means of a telecommunication network if, and only if, he or she

- (a) so modifies or interferes with the telecommunication network, or its operation;
- (b) so monitors transmissions made by means of the telecommunication network; or
- (c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the telecommunication network,

as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.

(5) References in this section to the interception of a communication do not include references to the interception of any communication broadcast for general reception.

Sections 90A,
90B and 90C
inserted.

3. The principal Act is amended by inserting after section 90 the following sections 90A, 90B and 90C:

“Immunity against suit. **90A.** No action shall lie against a person acting under the direction of an interception order issued by the Governor under section 90 for anything done or omitted to be done in good faith in the discharge of any functions, duties or powers under the direction of that order.

Interception of Communications Commissioner. **90B.** (1) The Cabinet may, on such terms and conditions as it thinks fit, appoint a Commissioner to be known as “the Interception of Communications Commissioner”.

(2) The Interception of Communications Commissioner shall

- (a) keep under review the exercise and performance of the powers under section 90(1) to (3) and the implementation and administration of the Code of Practice made under section 90(4);
- (b) be entitled to access to all applications, interception orders, intercepted communications, records and other documents relating to the exercise and performance of the powers under section 90(1) to (3) and the implementation and administration of the Code of Practice made under section 90(4);
- (c) submit to the Attorney General an annual report on the exercise and performance of the Governor’s powers under section 90(1) to (3) and the implementation and administration of the Code of Practice made under section 90(4) and the Attorney General shall promptly cause the report to be submitted to the National Security Council established under section 57 of the Virgin Islands Constitution Order 2007.

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(3) A report under subsection (2)(c) shall not disclose

- (a) the identity of a person in relation to whom an interception order has been applied for or has been made;
- (b) the identity of a person who authorised the interception of communications sent or received by him or her or the identity of the police officer who approved such interception;
- (c) the content of intercepted communications in such a way as to enable another person to deduce the identity of a person in relation to whom an interception order has been applied for or has been made.

(4) The Governor and the Commissioner of Police shall take cognizance of any reported breaches and rectify or, ensure the compliance by the Police Force, with the recommendations contained in the annual report of the Interception of Communications Commissioner, unless the National Security Council decides otherwise.

(5) In the performance of his or her functions, the Interception of Communications Commissioner shall not be subject to the direction or control of any other person or authority.

(6) No action shall lie against the Commissioner for anything done or omitted to be done in good faith in the discharge of any functions, duties or powers under this section.

Exclusion of Intercepted material from legal proceedings.

90C. (1) Intercepted material shall not be used as evidence in any legal proceedings.

(2) For the purposes of subsection (1), “intercepted material” means communications intercepted pursuant to an interception order under section 90 and includes copies, extracts and summaries of such communications and any record referring to the interception of communications which is a record of the identities of the persons to or by whom communications intercepted pursuant to the interception order or any copy, extract or summary of such communications was sent.”.

Passed by the House of Assembly this day of , 2010.

Speaker.

Clerk of the House of Assembly.

OBJECTS AND REASONS

The Telecommunications Act, 2006 (No. 10 of 2006) at section 90 presently empowers the Governor to make written requests and issue orders directly to operators of telecommunications networks and services providers to intercept telecommunications. The request may be issued for law enforcement purposes or to provide information or otherwise in aid of the Governor's authority.

This broad power has come up for review, particularly in light of the Virgin Islands Constitution Order, 2007. Fundamental Rights and Freedoms of the individual provide *inter alia* for a right to respect the privacy of home and correspondence, and for a right to freedom of expression.

Accordingly, the Bill seeks to amend section 90 of the Telecommunications Act, 2006 by prescribing the terms and limits that need to be applied to recognise these personal rights, whilst also providing for exceptions under which these rights may be limited or curtailed by the lawful interception of telecommunications. It will be recalled that the Constitution excepts acts that are reasonably justifiable in a democratic society in the interests of defence public safety, public order in addition to those limits that are for the prevention or detection of offences against the criminal law or customs law. Thus a new clause 90 is intended to repeal and replace the present section.

Since no powers are given under the present Telecommunications Act, 2006 for the Governor to make Regulations prescribing further the manner and administration circumstances under which lawful intercept may take place, the Bill seeks to address this by providing for the Governor to issue a Code of Practice. The Code of Practice would enlarge on the vital aspects of implementation such as the application process duration and renewal, modification and cancellation of orders, keeping of relevant records, disclosure shortage and disposal of these records and generally the use of interception orders. This is provided in clause 90 (2) of the Bill and is a requirement which exists in similar United Kingdom legislation. A definition of interception of telecommunications is also provided in clause 90 (4) and (5).

Clause 90A of the Bill affords immunity from legal suit to the implementers of lawful interception orders for acts done or omitted to be done in good faith under the Act. This is a new provision.

A new clause 90B is being proposed to provide for the designation and appointment of an Interception of Communications Commissioner. This Commissioner would have power to review the implementation of the entire

operations. An annual report would be required of the Interception Commissioner concerning the exercise of the powers conferred by the Act for authorising intercept and its implementation under the Code of Practice. To further protect the right to privacy, this Bill imposes restrictions on matters that may be disclosed in the annual report, such as the identities of officials. The annual report would be submitted to the Attorney General who would promptly submit it to the National Security Council.

The Governor and Commissioner of Police are required to note and rectify any lapses identified by the Interceptions of Communications Commissioner and avoid future lapses. Otherwise, recommendations made in the annual report would be for the discretion of the National Security Council (Clauses 90B (4) of the Bill). The Interception of Communications Commissioner is not subject to the direction or control of any person or authority in the performance of his functions (clause 90B (5) of the Bill) and, by clause 90B (6), he or she is also protected from legal suit.

Clause 90C is also new and is intended to remove any doubts as to whether intercepted material may be adduced as evidence in any legal proceedings. Intercepted material which is defined in the clause may not be adduced as evidence in legal proceedings.

The United Nations Convention against Transnational Organised Crime, 2000 (Palermo Convention) has been ratified by the United Kingdom, which is a requisite for compliance with the Financial Action Task Force Evaluations. The Palermo Convention proposes that nations adopt a scheme of electronic surveillance to better combat certain listed crimes and intercept capability is recommend. This has obvious consequences for the Virgin Islands.

Attorney General