

CRIMINAL PROCEDURE AND EVIDENCE (CONTROLLED INVESTIGATIONS) ACT, 2022

No. 14



of 2022

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An Act to provide for the authorisation of investigations for purposes of controlled investigations and the gathering of criminal evidence within and outside Botswana and to provide for any other related matters.

Date of Assent: 25.02.2022

Date of Commencement: 25.02.2022

ENACTED by the Parliament of Botswana.

PART I — *Preliminary (ss 1-4)*

Short title and commencement

1. This Act may be cited as the Criminal Procedure and Evidence (Controlled Investigations) Act, 2022, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Interpretation

2. In this Act, unless the context otherwise requires —
“applicant” means a law enforcement officer in an investigatory authority who applies for a warrant or an order under this Act;
“Authority” means the Communications Regulatory Authority;

- “Chairperson” means a chairperson appointed in terms of paragraph 4 of the Schedule;
- “Committee” means a Committee established under section 14;
- “communication service” has the same meaning assigned to it under the Communications Regulatory Authority Act;
- “comparable body” means an institution or government agency outside Botswana with functions similar to those of an investigatory authority;
- “controlled delivery” means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, —
- (a) with the knowledge and under the supervision of their competent authorities; and
 - (b) for the purpose of the—
 - (i) investigation of an offence, and
 - (ii) identification of persons involved in the commission of the offence;
- “controlled investigation” includes —
- (a) undercover operations;
 - (b) covert operations;
 - (c) use of informants;
 - (d) controlled delivery; and
 - (e) interception of communications;
- “court” or “the court” means the High Court;
- “informant” means a person who provides useful and credible information regarding criminal activity or a matter of interest to an investigatory authority, and includes —
- (a) a member of the public;
 - (b) the victim of a crime;
 - (c) a member of an organised criminal group; and
 - (d) an investigating officer;
- “intercept” means aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make the contents of a communication available to a person other than the sender or the recipient or intended recipient of that communication, and includes the —
- (a) monitoring of communication by means of a monitoring device;
 - (b) viewing, examination or inspection of the contents of any communication; and
 - (c) diversion of any communication from its intended destination to any other destination;
- “interception interface” means the physical location within the service provider’s telecommunications facilities where access to the intercepted communication or call-related information is provided;

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- “interception subject” means the person whose communications are to be or are being intercepted;
- “investigating officer” means an investigator in an investigatory authority;
- Cap. 08:07 “investigatory authority” has the same meaning assigned to it under the Financial Intelligence Act;
- “judicial officer” means a judge of the High Court;
- “key” means a numeric code or other means by which information is encrypted;
- Cap. 08:03 “serious crime related activity” has the same meaning assigned to it under the Proceeds and Instruments of Crime Act;
- “service provider” has the same meaning assigned to it under the Communications Regulatory Authority Act; and
- “target” means a person, place, vehicle, receptacle or anything in respect of which a controlled investigation has been authorised.
- Application
Jurisdiction **3.** This Act binds the State.
- 4.** (1) The courts of Botswana shall have jurisdiction where an act done or an omission made constituting an offence under this Act has been committed —
- (a) in the territory of Botswana;
 - (b) by a national of Botswana outside the territory of Botswana, if the person’s conduct constitutes an offence under the law of the country where the offence was committed and if the person has not been prosecuted for the offence in that country;
 - (c) on a ship or aircraft registered in Botswana;
 - (d) in part in Botswana; or
 - (e) outside the territory of Botswana and where any result of the offence has an effect in Botswana.

PART II — Undercover Operations (ss 5-19)

- Prohibition of
undercover
operation
without
warrant **5.** (1) An investigating officer shall not engage in an undercover operation unless the investigating officer is authorised to do so by an undercover warrant issued under this Part.
- (2) A person who engages in an undercover operation without authorisation commits an offence.
- Application
for undercover
operation
warrant **6.** (1) An investigating officer shall make an *ex parte* application to the court for an undercover operation warrant for purposes of gathering evidence in a controlled investigation.
- (2) An *ex parte* application under subsection (1) shall be heard in camera.
- (3) A warrant issued under subsection (1) shall be in writing and specify —
- (a) the date and time of the signing and the time from which the approval takes effect;

- (b) the persons who are authorised to participate in the operations;
- (c) the nature of the conduct in which the participants are authorised to engage, including —
 - (i) covert operations;
 - (ii) use of informants; and
 - (iii) controlled delivery;
- (d) the jurisdiction where the warrant is enforceable; and
- (e) a period, not exceeding three months, for which the approval is given.

7. (1) A court may grant an application to carry out an undercover operation for the purposes of gathering evidence of serious crime related activities where the court is satisfied that —

- (a) a person has engaged, is engaging or is about to engage in serious crime related activities of the kind to which the proposed undercover operation relates;
- (b) the proposed undercover operation is not more extensive than could reasonably be justified in view of the nature and extent of the suspected serious crime related activity;
- (c) the means are proportionate to the proposed undercover operation and are justified by the social harm of the serious crime related activity against which they are directed;
- (d) the undercover operation is sufficiently designed to provide a person who has engaged, or is engaging or is about to engage in serious crime related activity an opportunity —
 - (i) to manifest that behaviour, or
 - (ii) to provide additional evidence of that behaviour,

without undue risk that persons without a predisposition to a serious crime related activity will be encouraged into the serious crime related activity that they would otherwise have avoided.

(2) In determining an application for an undercover operation, a court shall consider whether approval for similar operations has previously been sought, and, if sought and refused, the reasons for that refusal.

(3) The court may renew, from time to time, a warrant for a period not exceeding 12 months.

8. (1) In determining an application for an undercover operation, a court shall consider —

- (a) whether what is sought to be achieved by the warrant could not reasonably be achieved by other less intrusive means;
- (b) whether the level of protection to be applied in relation to any obtaining of information by virtue of the warrant is higher because of the particular sensitivity of that information; and
- (c) any other aspects of the public interest in the protection of privacy.

(2) The other considerations by the court under subsection (1) may include —

- (a) national security interests;

Determination
of undercover
operation
warrant

Protection
of privacy
in controlled
investigations

Application for
assumed
identity

- (b) public interest in preventing or detecting serious crime related activity;
- (c) whether the conduct authorised is proportionate; or
- (d) any other consideration that the court may consider relevant for purposes of this Act.

9. (1) An applicant may apply to the court for authority to acquire an assumed identity for an undercover operation.

(2) An assumed identity application under subsection (1) shall —

- (a) be an *ex parte* application;
- (b) be in a sealed envelope marked classified; and
- (c) contain —
 - (i) the name of the applicant,
 - (ii) where the application is not made by the applicant, the name of the person to be authorised to acquire an assumed identity,
 - (iii) if the authorised person is not a law enforcement officer, the name and position of an investigating officer to be appointed as a supervisor of the authorised person during an undercover operation,
 - (iv) the reason for the assumed identity,
 - (v) details of the investigation or intelligence gathering exercise in respect of which the assumed identity will be used, and
 - (vi) details of the investigatory authority and the type of evidence to be gathered.

(3) In any application received in terms of subsection (2), the Registrar shall ensure that the application remains under seal and that the disclosure of any information in relation to the application shall be made only to the —

- (a) relevant officers directly concerned with the proceedings of the application;
- (b) judge allocated or judges empaneled to hear the application; and
- (c) parties to the application.

(4) If, in proceedings before a court, the identity of a person in respect of whom an authority is, or was in force, is in issue or may be disclosed, the court shall unless it considers that the interests of justice otherwise require —

- (a) ensure that such parts of the proceedings as relate to the identity of the person are held in camera; and
- (b) make such orders as to the suppression of evidence given before it as will ensure that the identity of the person is not disclosed.

(5) The court may, for purposes of subsection (1) —

- (a) allow a person in respect of whom an authority is, or was in force, to appear before it under the assumed name or under a code name or code number; and

- (b) make orders prohibiting the publication of any information, including information derived from evidence given before it, that identifies, or might facilitate the identification of any person who has been, or is proposed to be, called to give evidence.

10. (1) The court may, on receipt of an application under section 9, issue the applicant with an authority to acquire an assumed identity where the court is satisfied that —

Authorisation
for assumed
identity

- (a) the assumed identity is necessary for purposes of an investigation or intelligence gathering in relation to a serious crime related activity; and
(b) the risk of abuse of the assumed identity by the authorised person is minimal.

(2) An investigating officer appointed as supervisor under section 9 (2) (c) shall hold a designation as may be prescribed.

(3) A person shall apply for a separate authority for each assumed identity.

11. (1) Where a court issues an authority to acquire an assumed identity under section 10 (1), such authority shall be in writing.

Issuance of
assumed
identity

- (2) The authority under subsection (1) shall specify —
(a) the particulars of the person issuing the authority;
(b) the date on which the authority comes into effect;
(c) details of the assumed identity authorised;
(d) details of the evidence to be acquired under the authority;
(e) the conditions to which the authority is subject;
(f) the reason why the authority is granted;
(g) where the authority relates to an applicant, the name of the applicant;
(h) where the authority relates to an authorised civilian —
(i) the name of the authorised civilian,
(ii) the name of his or her supervisor, and
(iii) a period which may not exceed three months;
(i) whether it authorises an application for an order for —
(i) an entry in the register of births and deaths,
(ii) an entry in the register of marriages,
(iii) the issuance of a travel document, or
(iv) an entry in a corresponding law; and
(j) the participating jurisdictions in which the assumed identity may be used.

12. (1) An applicant may make an application to a court to vary or cancel an authority.

Variation and
cancellation of
authority

- (2) Subject to subsection (1), the court —
(a) may vary or cancel the authority; and
(b) shall cancel the authority if satisfied, on a review or otherwise, that the grounds for the granting of the authority no longer exist.

(3) The court shall give written notice of the variation or cancellation under this section to —

- (a) the applicant; and
(b) if the authorised person is an authorised civilian, the authorised person's supervisor.

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- (4) The notice under subsection (3) shall specify the reason for the variation or cancellation.
- (5) A variation or cancellation under this section shall take effect on —
- (a) the day the written notice is given to the authorised person; or
 - (b) a specified day in the notice.
- 13.** (1) The court shall, at least once in every 12 months' period, review each authority granted under this Part.
- (2) Where upon review under subsection (1), the court is satisfied that the grounds for the granting of the authority still exist, the court shall —
- (a) record its opinion and its reasons, in writing; and
 - (b) extend the authority.
- 14.** (1) There is hereby established a Controlled Investigations Coordination Committee.
- (2) The composition, functions and powers of the Committee shall be as set out in the Schedule.
- 15.** (1) If, in proceedings before a court, the identity of a person in respect of whom an authority is, or was in force, is in issue or may be disclosed, the court shall, unless it considers that the interests of justice otherwise require —
- (a) ensure that such parts of the proceedings as relate to the identity of the person are held in camera; and
 - (b) make such orders as to the suppression of evidence given before it as, in its opinion, will ensure that the identity of the person is not disclosed.
- (2) The court may, for purposes of subsection (1) —
- (a) allow a person in respect of whom an authority is, or was in force, to appear before it under the assumed name or under a code name or code number; and
 - (b) make orders prohibiting the publication of any information, including information derived from evidence given before it, that identifies, or might facilitate the identification of, any person who has been or is proposed to be called to give evidence.
- 16.** (1) In issuing an applicant with an authority to acquire an assumed identity under section 11, the court may authorise the following —
- (a) an order for an entry in the register of births and deaths in terms of section 4 of the Births and Death Registration Act;
 - (b) an order for an entry in the national register in terms of the National Registration Act;
 - (c) an order for the entry in the register of marriages in terms of section 28 of the Marriage Act;
 - (d) an order for the issuance of a travel document in terms of the Immigration Act; and
 - (e) the use of an assumed identity in a participating jurisdiction in which the assumed identity may be used.

Annual review of issued authorities

Establishment of Controlled Investigations Coordination Committee

Non-disclosure of identity in legal proceedings

Entries in the registers

Cap. 30:01

Cap. 01:02

Cap. 29:01

Cap. 25:02

- (2) Subject to section 11, where the court grants an authority it shall order —
- (a) the Registrar of Births and Deaths to make an entry in the register under the Births and Deaths Registration Act;
 - (b) the Registrar of National Registration to make an entry in the register under the National Registration Act;
 - (c) the Registrar of Marriages to make an entry in the marriage register under the Marriage Act; and
 - (d) the Director of Immigration to issue a travel document under the Immigration Act, in relation to the acquisition of an assumed identity under an investigatory authority or comparable body.
- (3) The court may make an order under this section —
- (a) on application by an applicant; and
 - (b) where it is satisfied that the order is justified, having regard to the nature of the activities undertaken or to be undertaken by the applicant or person under an investigatory authority or comparable body.
- (4) The Registrar of Births and Deaths, the Register of National Registration, the Registrar of Marriages and the Director of Immigration shall give effect to an order under this section —
- (a) within the period specified in the order; or
 - (b) if no period is specified in the order, within 14 days after the day on which the order is made.
- 17.** (1) This section shall apply if —
- (a) the court cancels an authority for an assumed identity; and
 - (b) there is an entry in relation to that identity —
 - (i) in the register under the Births and Deaths Act, in the register under the National Registration Act, in the register under the Marriages Act or in a travel document issued under the Immigration Act as a consequence of an order under section 16, or
 - (ii) in a register of births, deaths, national registration, marriages or the issuance of a travel document in a participating jurisdiction as a consequence of an order under the corresponding law of the jurisdiction.
- (2) Where subsection (1) (b) (i) applies —
- (a) an applicant shall, within 28 days after the day on which the authority is cancelled, apply to the court for an order that the Registrar of Births, and Deaths, Registrar of National Registration, the Registrar of Marriages or the Director of Immigration cancel the entry; and
 - (b) the Registrar of Births and Deaths, Registrar of National Registration, Registrar of Marriages or the Director of Immigration shall give effect to the order within 28 days after the day on which the order is made.

Cancellation
of authority in
registers

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- Prohibition of disclosure of identity
- (3) Where subsection (1) (b) (ii) applies, the applicant shall apply for an order under the corresponding law to cancel the authority.
- 18.** Notwithstanding the provisions of section 15, a person who discloses the identity of another person which he or she obtained or to which he or she has had access by virtue of —
- (a) the performance of his or her duties or functions under this Act; or
 - (b) his or her position as a person who holds or has held office in the investigatory authority, and from which the identity of a person who —
 - (i) is or was a confidential source of information to the investigatory authority, or
 - (ii) is or was an officer or support staff engaged in undercover operational activities of an investigatory authority,
- and who discloses such information to a person other than a person to whom he or she is authorised to disclose the information to or to whom it may lawfully be disclosed, commits an offence and is liable to a fine not exceeding P50 000 or a term of imprisonment not exceeding 12 years.
- Misuse of assumed identity
- 19.** An investigating officer who —
- (a) intentionally, knowingly or recklessly acquires evidence of, or uses, an assumed identity covered by his or her authority; and
 - (b) knows that, or is reckless as to whether, the acquisition or use is not —
 - (i) in accordance with his or her authority, or
 - (ii) in the course of duty,
- commits an offence and is liable to a term of imprisonment for life.

PART III — *Interception of Communications (ss 20-28)*

- Prohibition of interception communications without a warrant
- 20.** (1) An investigating officer shall not intercept communications unless the investigating officer is authorised to do so by an interception warrant issued under this Part.
- (2) A person who intercepts communication without a warrant commits an offence.
- Application for interception warrant
- 21.** (1) An applicant shall make an *ex parte* application to the court for an interception warrant for purposes of gathering evidence in a controlled investigation.
- (2) An application under subsection (1) shall contain the following information —
- (a) the person whose communication is intercepted;
 - (b) the basis for believing that communication relating to the ground on which the application is made will be obtained through the interception;
 - (c) the service provider to whom the direction to intercept the communication shall be addressed, where applicable;
 - (d) the nature and location of the place from which the communication is to be intercepted;

- (e) full particulars of all the facts and circumstances alleged by the applicant in support of his or her application;
- (f) whether other investigative procedures have been applied and have failed to produce the required evidence;
- (g) whether other investigative procedures involve undue risk to the safety of members of the public or to those wishing to obtain the required evidence; and
- (h) the period for which the authorisation is required to be issued.

22. (1) A person shall not intercept communication in the course of its transmission —

Control of interception

- (a) by means of a telecommunication system or radio communication system, unless the person —
 - (i) is a party to the communication,
 - (ii) has the consent of the parties to the communication, or
 - (iii) is authorised by warrant, and
- (b) through the post, unless the person —
 - (i) has the consent of the person to whom, or the person by whom, the communication is sent, or
 - (ii) is authorised by warrant.

(2) Subsection (1) shall not apply to the *bona fide* interception of a communication for the purpose of or in connection with the provision, installation, maintenance or repair of a postal, telecommunication or radio communication service.

(3) Subject to subsections (1) and (2), a person who intentionally intercepts or attempts to intercept, or authorises or procures another person to intercept or attempt to intercept, at any place, communication in the course of its occurrence or transmission commits an offence and is liable to a fine not exceeding P50 000 or to a term of imprisonment not exceeding 12 years, or to both.

23. (1) The court shall grant an application to carry out an interception of communication warrant for purposes of gathering evidence of a serious crime related activity where the court is satisfied that there are reasonable grounds to believe that material information relating to —

Determination for interception warrant

- (a) the commission of an offence; or
 - (b) the whereabouts of a person suspected to have committed an offence, is contained in the communication.
- (2) Section 15 shall, with the necessary modifications, apply to this Part.
- (3) A court may approve a warrant under subsection (1) and may —
- (a) require a communication service provider to intercept and retain specified communication of a specified description received or transmitted, or about to be received or transmitted by that communication service provider; or
 - (b) authorise an investigating officer to enter a premises and to install on such premises, a device for the interception and retention of a specified communication or other communication of a specified description, and to remove and retain such device.

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Issuance of interception warrant

24. (1) The court may grant a warrant to carry out an interception of communications for purposes of gathering evidence of serious crime related activities where the court is satisfied that —

- (a) a serious crime related activity is being or will probably be committed;
- (b) the gathering of information concerning an actual threat to national security or to 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) A warrant granted under subsection (1), —

- (a) shall be valid for such period not exceeding three months and may be renewed for a period not exceeding three months;
- (b) shall specify the name and address of the interception subject and the manner of interception;
- (c) may order the service provider to comply with such technical requirements as may be specified by the court to facilitate the interception;
- (d) shall specify the apparatus and other means that are to be used for identifying the communication that is to be intercepted; and
- (e) shall contain any other necessary details relating to the interception target.

(3) The court may, if it is of the opinion that the circumstances so require, amend or revoke the authorisation at any time.

Evidence obtained in excess of authorisation or warrant

25. (1) Any evidence obtained by means of an interception made in excess of an authorisation issued under Part II or warrant issued under this Part shall be admissible in evidence, in criminal proceedings, only with the leave of the court.

(2) The court in granting or refusing a leave under subsection (1), shall have regard to —

- (a) the circumstances in which the evidence was obtained;
- (b) the potential effect of the evidence admission or exclusion on issues of national security; and
- (c) the unfairness to the accused that may be occasioned by the evidence admission or exclusion.

Notice of disclosure of protected information

26. (1) Where an applicant has reasonable grounds —

- (a) that a key to protected information is in the possession of a person;
- (b) that the imposition of a disclosure requirement in respect of protected information is necessary —
 - (i) in the interests of national security,
 - (ii) for the purpose of preventing and detecting a serious crime related activity, or
 - (iii) in the public interest; and
- (c) that the imposition of a disclosure requirement referred to in paragraph (b) is proportionate to what the imposition seeks to achieve; and

- (d) that it is not reasonably practicable for the applicant to obtain possession of protected information in an intelligible form without giving of notice under this section, the applicant may, by notice to the person whom he or she believes to have possession of the key, impose a disclosure requirement in respect of the protected information.
- (2) A notice under this section imposing a disclosure requirement in respect of protected information shall —
- (a) be in writing;
 - (b) describe the protected information to which the notice relates;
 - (c) specify why the protected information is required;
 - (d) specify the duration of the notice; and
 - (e) set out the disclosure that is required by the notice and the form and manner in which it is to be made.
- (3) A notice under this section shall not require disclosure to a person other than —
- (a) the person giving the notice; or
 - (b) such other person as may be specified in the notice.
- (4) A person to whom a notice has been given in terms of this section and who is in possession of both the protected information and the key thereto shall —
- (a) use the key in his or her possession to provide access to the information; and
 - (b) in providing access to such information, make a disclosure of the information.
- (5) Where a person to whom the notice has been given under this section is in possession of different keys, or a combination of keys, to protected information —
- (a) it shall not be necessary for purposes of complying with the notice for the person given notice, to disclose keys in addition to those the disclosure of which alone, are sufficient to enable the applicant to obtain access to the protected information and to put it in an intelligible form; and
 - (b) the person given notice may select which of the keys or combination of keys, may be used for complying with the notice.
- (6) Where a person to whom a notice has been given under this section —
- (a) no longer possesses a key to the protected information; and
 - (b) has information that will facilitate the obtaining or discovery of the key to protected information,
- he or she shall disclose this, as soon as practicably possible, to the applicant.
- (7) The applicant to whom a key has been disclosed under this section shall —
- (a) use the key only in respect of the protected information, and in the manner and for the purposes specified in the notice; and

Restriction on disclosure of communication or information

- (b) on or before the expiry of the period or extended period for which the notice has been issued, destroy all records of the disclosed key if, in the opinion of the applicant —
 - (i) criminal proceedings or civil proceedings are not being instituted in connection with such records, or
 - (ii) such records will not be required for criminal or civil proceedings.
- (8) A person who fails to make a disclosure required by the notice issued under this section commits an offence and is liable to a fine not exceeding P10 000 or to imprisonment for a period not exceeding six years, or to both.

27. (1) A person shall not disclose communication or information which he or she obtained in the exercise of his or her powers or the performance of his or her duties in terms of this Act unless he or she is required to do so in terms of any written law or by an order of the court.
(2) Notwithstanding subsection (1), a person may disclose communication or information he or she obtained in the exercise of his or her powers or the performance of his or her duties in terms of this Act, —

- (a) to another person who of necessity requires it for the like exercise or performance of his or her functions in terms of this Act; or
 - (b) information which is required to be disclosed as evidence in court.
- (3) A person who discloses communication or information in contravention of subsection (1) commits an offence and is liable to a fine of not exceeding P50 000 or to imprisonment for a period not exceeding 12 years, or to both.

Duties and Responsibilities of service providers

- 28.** (1) A service provider shall —
- (a) have postal or telecommunications systems which are technically capable of supporting lawful interceptions at all times in accordance with sections 20 and 22;
 - (b) install hardware and software facilities and devices which enable the interception of communications at all times or when so required, as the case may be;
 - (c) have services which are capable of rendering real time and full time monitoring facilities for the interception of communications;
 - (d) provide all call-related information in real-time or as soon as possible upon call termination;
 - (e) provide one or more interception interfaces from which the intercepted communication shall be transmitted to the investigatory authority;
 - (f) transmit intercepted communications to the investigatory through fixed or switched connections, as may be specified by the court;
 - (g) provide access to all interception subjects operating temporarily or permanently within their communications systems, and where the interception subject may be using features to divert calls to other service providers or terminal equipment, access to such other providers or equipment;

- (h) provide, where necessary, the capacity to implement a number of simultaneous interceptions in order to —
- (i) allow monitoring by more than one authorised person, and
 - (ii) safeguard the identities of applicants and ensure the confidentiality of the investigations; and
- (i) implement all interceptions in such a manner that neither the interception target nor another applicant is aware of any changes made to fulfil the warrant.

(2) A service provider who fails to give assistance in terms of this section commits an offence and is liable to a fine not exceeding P50 000 and each director also commits an offence and is liable to imprisonment for a period not exceeding 10 years unless the director establishes that he or she took reasonable precautions and exercised due diligence to avoid the commission of the offence.

(3) The Authority may revoke the licence of a services provider or protected information key holder who discloses information in contravention of subsection (1).

PART IV — *Handling of Information from Controlled Investigations*
(ss 29-31)

29. The head of an investigatory authority shall ensure that reasonable care is taken to protect and preserve information where evidence gathered from a controlled investigation is sufficient for analysis in a controlled investigation.

Handling of
information

30. (1) The head of an investigatory authority shall retain information obtained through controlled investigations as may be prescribed.

Retention and
storage of
information

(2) The court may, on application by an applicant, order that information obtained from the carrying out of a controlled investigation in respect of a serious crime related activity shall be retained, if the court is satisfied that there are reasonable grounds to believe that —

- (a) the information obtained from the analysis of the controlled investigation is likely to produce evidence of probative value in relation to an offence; and
- (b) during the controlled investigation there may be information that may lead to a conviction.

(3) A court order granted under this section shall state the period for which the information obtained may be retained.

31. (1) A recording made on audiotape, videotape, electronic or other means by an applicant acting in terms of this Act, that is not required for investigative or evidentiary purposes, may be retained for such purpose and period as the Minister may direct.

Retention of
electronic
record

(2) The Minister shall prescribe the manner and time frame for the retention of the matter referred to in subsection (1).

PART V — *Admissibility of Evidence (ss 32-35)*

Legally obtained information

32. Any evidence obtained through a controlled investigation carried out in accordance with this Act shall be admissible as evidence in court.

Evidence relating to carrying out of controlled investigation

33. Any evidence relating to the details as to how a controlled investigation was carried out shall be admissible in court —

- (a) to establish or rebut an allegation that unreasonable force was used during the carrying out of the controlled investigations; or
- (b) to decide the admissibility of a confession or admission, or other evidence averse to the suspect if the suspect alleges that the evidence was induced or obtained by the use of unreasonable force.

Admissibility of evidence from foreign State

34. Information contained in a communication retained in a foreign State in accordance with the law of that foreign State and certified by a judicial officer of that foreign State to have been so intercepted and retained, shall be admissible as evidence in proceedings for an offence under this Act.

Inadmissible evidence

35. (1) Any evidence not obtained in terms of this Part, shall not be admissible as evidence in court.

(2) Notwithstanding subsection (1), the court may consider the following in deciding whether to admit any evidence —

- (a) the probative value of the evidence, including whether evidence of equivalent probative value could have been obtained by other means; and
- (b) all relevant factors which, in the opinion of the court, are necessary for arriving at such a decision.

PART VI — *Miscellaneous Provisions (ss 36-40)*

Legal indemnity

36. An action shall not be brought against any member of staff of an investigatory authority or any other officer (or any other person authorised by the court to perform any act under this Act), in respect of anything done while taking part in the authorised conduct granted in terms of this Act.

Offences and penalties

37. (1) A person who delays, interferes with or wilfully obstructs an applicant in the exercise of the powers conferred under this Act, commits an offence and is liable to a fine not exceeding P10 000 or to a term of imprisonment for a period not exceeding 12 years, or to both.

(2) A person who contravenes an authorisation or warrant issued under this Act commits an offence and is liable to a fine not exceeding P100 000 or to imprisonment for a term not exceeding 15 years, or to both.

Administrative sanctions and compensations

38. The Committee may impose an administrative penalty or award of compensation not exceeding P500 000 for purposes of paragraph 1 (2) in the Schedule.

39. (1) The Minister may make regulations prescribing anything under this Act which is to be prescribed, or which is necessary or convenient to be prescribed, for the better carrying out of the objects and purposes of this Act.

Regulations

(2) Without prejudice to the generality of subsection (1), regulations may provide for —

- (a) reporting obligations of an investigatory authority;
- (b) measures to ensure the security of information disclosed by or to the investigatory authority; and
- (c) the manner and form an investigatory authority is to keep records required under this Act.
- (d) the form and manner for applications made in terms of this Act; and
- (e) procedure, manner and form for complaints and award of compensation made in terms of the Schedule.

40. (1) A warrant or authorisation issued for a controlled investigation before the commencement of this Act shall, in so far as it is not inconsistent with this Act, continue to be effective as if issued under this Act.

Savings and transitional provisions

(2) Information or material obtained from the undercover operations or interception of communication before the commencement of this Act by means of a warrant or an authorisation issued in other relevant Acts, may be retained or used for —

- (a) investigative purposes;
- (b) evidentiary purposes; or
- (c) any other legal purposes,

notwithstanding that the retention or use of the information or material from such undercover operations or interception of communication would, if obtained after the commencement of this Act, constitute a breach of this Act.

(3) Any lawful act done before the commencement of this Act, that falls within this Act shall, in so far as it is not inconsistent with this Act, continue to be applicable as if done under this Act.

(4) The Minister may, by Order published in the *Gazette* —

- (a) pending the appointment of the Committee, make such transitional arrangements as may be necessary for purposes of the discharge of the functions of the Committee; and
- (b) make such transitional arrangements as may be necessary for the purposes of the provisions of this Act.

SCHEDULE

(section 14 (2))

CONTROLLED INVESTIGATIONS COORDINATION COMMITTEE

Functions of the Committee

1. (1) The functions of the Committee shall be to —
 - (a) assess the effectiveness of policies and measures of criminal investigations to combat serious crime related activities;
 - (b) make recommendations to the Minister for legislative, administrative and policy reforms in respect to criminal investigations; and
 - (c) promote coordination among the investigatory authorities, supervisory authorities and other institutions with a view to improving the effectiveness of existing policies and measures to combat financial offences through criminal investigations.
- (2) Notwithstanding the generality of subparagraph (1), the Committee shall —
 - (a) protect the interests of interception subjects and targets;
 - (b) receive and hear complaints in respect of the use of warrants issued under this Act, and shall in hearing the complaints —
 - (i) apply the same principles as would be applied by a court on an application for judicial review,
 - (ii) consider matters before the Committee with a sufficient degree of care as to ensure the protection of privacy and interests of complainants in line with section 8, and
 - (iii) impose administrative sanctions, award compensation, issue and follow up enforcement procedures to ensure compliance with conditions of warrants issued under this Act:

Provided that an administrative sanction, award of compensation or decision made by the Committee under this paragraph shall have the same effect as a judgment of the court;
 - (c) recommend regulations for the better carrying out of its responsibilities under this Act, including —
 - (i) codes of conduct, and
 - (ii) records to be kept by investigatory authorities for applications for warrants under this Act;
 - (d) advise the Minister on matters relating to controlled investigations techniques and proposed policy and legislation; and
 - (e) perform all additional functions and duties as may be prescribed.

Powers of the Committee

2. For the purpose of carrying out its functions under this Act, the Committee shall have power to do all such things as appear to it to be necessary or incidental to the proper discharge of its functions, and may, in that behalf, act in association with other persons or bodies who are knowledgeable about controlled investigations.

Composition of Committee

3. (1) The Committee shall comprise of the following members —
- (a) the Permanent Secretary responsible for defence, justice and security or his or her representative;
 - (b) the Permanent Secretary responsible for international cooperation or his or her representative;
 - (c) the Attorney General, or his or her representative; and
 - (d) six other persons, appointed by the Minister in consultation with the Chairperson, from among persons with —
 - (i) at least 10 years' experience in human rights, finance, law enforcement, intelligence, information and communications technology, including any other related subject, and
 - (ii) expertise in subjects under subparagraph (i).
- (2) A representative under subparagraph (1) shall not be below the level of Deputy Permanent Secretary.
- (3) A person under subparagraph (1) (d) shall be subjected to a security clearance to access sensitive or classified information.

Chairperson of Committee

4. (1) The Committee shall have a Chairperson who shall be —
- (a) a Justice of Appeal or retired Justice of Appeal, judge or retired judge, or legal practitioner who qualifies to be appointed as a judge; and
 - (b) appointed by the Minister.
- (2) The members of the Committee shall appoint, from among their number, a vice-chairperson.
- (3) A member of the Committee shall hold office for a term not exceeding four years and shall be eligible for re-appointment for another four year term upon the expiry of his or her term of office.

Disqualification for appointment as a Committee Member

5. A person shall not be appointed as a member of the Committee under paragraph 3 (d) or be qualified to continue to hold office who has —
- (a) in terms of a law in force in any country —
 - (i) been adjudged or otherwise declared bankrupt and has not been rehabilitated or discharged, or
 - (ii) made an assignment to, or arrangement or composition with, his or her creditors, which has not been rescinded or set aside; or
 - (b) within a period of 10 years immediately preceding the date of his or her proposed appointment, has been convicted of a criminal offence and sentenced by a court of competent jurisdiction to imprisonment for a period of six months or more without the option of a fine, whether that sentence has been suspended or not, and for which he or she has not received a free pardon.

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Vacation of office

6. A Committee member shall vacate his or her office —
- (a) if he or she becomes disqualified in terms of paragraph 5 of this Schedule to hold office as a Committee member;
 - (b) if he or she is absent from three consecutive meetings of the Committee without reasonable excuse;
 - (c) upon his or her death;
 - (d) upon the expiry of one month's notice, given in writing to the Minister, of his or her intention to resign his or her office;
 - (e) upon the expiry of such time as the Minister may specify in writing, notifying him or her of his or her removal from office by the Minister;
 - (f) if he or she becomes mentally or physically incapable of performing his or her duties, as certified by a qualified medical practitioner, as a member of the Committee; or
 - (g) if he or she is convicted of an offence under this Act, or under any other Act for which he or she is sentenced to imprisonment for a term of six months or more without the option of a fine.

Removal and suspension from office by Minister

7. (1) The Minister may, if he or she is satisfied that a Committee member has acted improperly as such member, or is mentally or physically incapable of performing his or her duties efficiently, require that member, in writing, to vacate his or her office within such time as he or she may specify.
- (2) The Minister shall, in writing, suspend from office a Committee member against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment may be imposed, and whilst that member is so suspended he or she shall not carry out any duties or be entitled to any remuneration or allowances as a member of the Committee.

Filling of vacancies

8. On the death of, or the vacating of office by, a Committee member, the Minister shall appoint a person to take the place of the member who died or vacated his or her office until the expiry of the period during which such member would have otherwise continued in office.

Secretariat

9. The Ministry responsible for defence, justice and security shall act as the Committee's Secretariat.

Meetings of Committee

10. (1) Subject to the provisions of this Act, Committee shall regulate its own proceedings.

(2) The Committee shall meet as often as is necessary or expedient for the discharge of its functions:

Provided that at least twelve ordinary meetings shall be held in each year, and such meetings shall be held at such place, time and day as the Chairperson may determine.

(3) Upon giving notice in writing of not less than 14 days, a meeting of the Committee may be called by the Chairperson provided that if the urgency of any particular matter does not permit the giving of such notice, a special meeting may be called upon giving of a shorter notice.

(4) The quorum at any meeting of the Committee shall be a simple majority of the members of the Committee.

(5) There shall preside at any meeting of the Committee —

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson; or

(c) in the absence of the Chairperson and Vice-Chairperson, such member as the member's present may elect from amongst themselves for the purpose of that meeting.

(6) A decision of the Committee on any question shall be by the majority of the members present and voting at the meeting and, in the event of an equality of votes, the member presiding shall have a casting vote in addition to that person's deliberative vote.

Disclosure of interest

11. (1) If a member is present at a meeting of the Committee in which the member is directly or indirectly interested in a private capacity is the subject of consideration, he or she shall, as soon as practicable after the commencement of the meeting, declare such interest and shall not, unless the Committee otherwise directs, take part in any discussion or voting of the Committee on such matter.

(2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) Where a member fails to disclose his or her interest in accordance with subparagraph (1), and a decision by the Committee is made benefitting such member, such decision shall be void to the extent that it benefits such member.

(4) A member who contravenes subparagraph (1) commits an offence.

Confidentiality

12. (1) A member or any person attending a meeting of the Committee shall observe and preserve the confidentiality of all matters coming before the Committee, and such confidentiality shall subsist even after the termination of their terms of office or their expert mandates.

(2) Any person to whom confidential information is revealed through working with the Committee shall not disclose that information to any other person unless he or she is required to do so in terms of any written law.

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(3) Notwithstanding the provisions of paragraph (1), a member may disclose information relating to the affairs of the Committee acquired during the performance of his or her duties —

- (a) within the scope of his or her duties under this Act; or
- (b) when required to —
 - (i) by an order of court,
 - (ii) under any written law, or
 - (iii) in the investigation of an offence.

(4) A person who contravenes the provisions of this paragraph commits an offence.

Co-option of advisory personnel to Committee

13. The Committee may co-opt any person to attend any meeting of the Committee on any matter for the purpose of assisting or advising the Committee, but such person shall have no right to vote.

Committee's funds

14. The Committee's funds shall consist of monies allocated to it from the Consolidated Fund.

Payment of Members

15. A Committee member shall be paid such allowance and such travelling expenses, incurred in connection with his or her service on the Committee, as the Minister may determine.

Signification of documents

16. All decisions of the Committee shall be signified under the hand of the Chairperson of the Committee, or a member who presided at the meeting where the decision is made.

Annual Report

17. (1) The Committee shall, within a period of six months of the end of the financial year, or within such longer period as the Minister may approve, submit, to the Minister, a comprehensive report on its operations during such year.

(2) The Minister shall, within 30 days of him or her receiving the report under subparagraph (1), lay such report before the National Assembly.

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PASSED by the National Assembly this 4th day of February, 2022.

BARBARA N. DITHAPO,
Clerk of the National Assembly.