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## GENERAL NOTICE

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### NOTICE 1301 OF 2005

#### DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

#### INVITATION TO COMMENT ON PROPOSED NOTICE IN TERMS OF SECTION 44(1)(a) OF THE REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION ACT, 2002 (ACT 70 OF 2002)

In terms of section 44(2)(a)(ii), read with section 44(2)(b) and section 44(1)(a), of the Regulation of Interception of Communications and Provision of Communication-related Information **Act**, 2002 (Act No.70 of 2002) (hereinafter referred to as the Act), interested parties are hereby invited to lodge in writing and within a period of 32 days (calculated from the date of publication of this notice) comments and representations in connection with the proposed notice set out in the Annexure hereto.

Representations should be marked for the attention of S J Robbertse and -

(a) if forwarded by post, be addressed to-

The Director-General: Justice and Constitutional Development

Private Bag X81

PRETORIA

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(b) if delivered by hand, be delivered at -

Momentum Building

329 Pretorius Street

Pretoria

- (c) if sent by E-mail, be sent **to** the following address –

**srobbertse@justice.gov.za**

### **Background information**

The following background information is hereby furnished in order to assist interested parties to make representations on the **draft** notice:

1. In terms of Proclamation No. R. 55 of 30 September 2005, -
  - (a) the Act, with the exception of sections 40 and 62 of the Act, commenced on 30 September 2005; and
  - (b) sections 40 and 62(6) of the Act will commence on 30 November 2005.
  
2. Section 44 of the Act provides as follows:

“44. (1) (a) The Minister must, by notice in the Gazette, declare any electronic, electro-magnetic, acoustic, mechanical or other instrument, device or equipment, the design of which renders it primarily useful for purposes of the interception of communications, under the conditions or circumstances specified in the notice, to be listed equipment.

  - (b) A notice issued under paragraph (a) may at any time in like manner be amended or withdrawn.
  - (c) The first notice to be issued under paragraph (a) must be published in the Gazette within three months after the fixed date.

(2) (a) Before the Minister exercises the powers conferred upon him or her by subsection (1), he or she must-

  - (i) consult the relevant Ministers; and
  - (ii) cause to be published in the Gazette a draft of the proposed notice, together with a notice inviting all interested parties **to** submit to **him** or her in writing **and** within a specified period, comments and representations in connection with the proposed notice.
  - (b) A period of not less than one month must elapse between the publication of the **draft** notice and the notice under subsection (1).
  - (3) Subsection (2) does not apply-

- (a) if the Minister, in pursuance of comments and representations received in terms of subsection (2) (a) (ii), decides to publish a notice referred to in subsection (1) in an amended form; and
  - (b) to any declaration in terms of subsection (1) in respect of which the Minister is of the opinion that the public interest requires that it be made without delay.
- (4) Any notice issued under subsection (1) must, before publication thereof in the Gazette, be submitted to Parliament.”

3. Section 45 of the Act provides as follows:

“45 (1) Subject to subsection (2) and section 46, no person may manufacture, assemble, possess, sell, purchase or advertise any listed equipment.

(2) Subsection (1) does not apply to any telecommunication service provider or other person who, or law enforcement agency which, manufactures, assembles, possesses, sells, purchases or advertises listed equipment under the authority of a certificate of exemption issued to him or her or it for that purpose by the Minister under section 46.”

4. The relevant provisions of section 46 of the Act may be summarised as follows:

- (a) In terms of section 46(1)(a) the Minister may, upon application and in consultation with the relevant Ministers, exempt any-
  - (i) telecommunication service provider or any other person from one or all of the prohibited acts referred to in section 45 (1); or
  - (ii) law enforcement agency from the prohibited acts of possessing and purchasing referred to in section 45 (1),
 for such period and on such conditions as the Minister determines.
- (b) Section 46(2) provides that the Minister may **only** grant an exemption under subsection (1) (a) if he or she is satisfied that-
  - (i) in the case of an exemption under paragraph (a)(i), above, (section 46 (1) (a) (ii) of the Act), the purpose for which the listed equipment will be manufactured, assembled, possessed, sold, purchased or advertised is reasonably necessary; and
  - (ii) such exemption is in the public interest; or
  - (iii) special circumstances exist which justify such exemption.

- (c) An exemption under section **46 (1)(a)** must be granted by issuing to the-
- (i) telecommunication service provider or other person; or
  - (ii) law enforcement agency,
- concerned, a certificate of exemption in which his or her or its name and the scope, period and conditions of the exemption are specified. The certificate of exemption must be published in the Gazette and becomes valid upon the date of such publication.
- (d) In terms of section **46(5)** a certificate of exemption referred to in paragraph (c), above, may at any time in like manner be amended or withdrawn by the Minister.
- (e) An exemption under subsection **46(1) (a)** lapses upon-
- (i) termination of the period for which it was granted; or
  - (ii) withdrawal of the relevant certificate.

**5.** Section 51(1)(a) of the Act provides that any person who contravenes section 45(1) is guilty of an offence. Section 51(1)(b)(i) makes a contravention of section 45(1) punishable, with a fine not exceeding R2 000 000 or to imprisonment for a period not exceeding 10 years.

**6.** Section 57 of the Act provides that a **court** convicting a person of an offence referred to **in** section 51 must, in addition to any penalty which it may impose in respect of that offence, declare any listed equipment-

- (a) by **means** of which the **offence** was committed;
- (b)** which was used in connection with the commission of the offence;
- (c) which was found in the possession of the convicted person; or
- (d) the possession of which constituted the offence,

to be forfeited to the State. Section 57 **also** makes provision for the manner to dispose of listed equipment and the rights of aggrieved parties who are adversely affected by a forfeiture order.

**ANNEXURE****GOVERNMENT NOTICE****DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT****No. R****2005****NOTICE IN TERMS OF SECTION 44(1)(a) OF THE REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION ACT, 2002 (ACT 70 OF 2002)**

I, Brigitte Sylvia Mabandla, Minister for Justice and Constitutional Development, acting under section 44(1)(a) of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No.70 of 2002), hereby declare the instruments, devices or equipment mentioned in Column 1 of the Schedule, under the conditions or circumstances specified in Column 2 of the Schedule, to be listed equipment.

**B. S. MABANDLA, MP****Minister for Justice and Constitutional Development**

## SCHEDULE

Column 1	Column 2
<p>(1) Any instrument, device or equipment which is capable of being used to record or monitor the communications being put on to or retrieved from a computer, including but not limited to -</p> <p>(a) keystroke recorders;</p> <p>(b) software that has the ability to store and/or retrieve information without the permission of the author of the communication.</p>	<p>To manufacture, assemble, possess, sell, purchase or advertise any of these instruments, devices or equipment, with the intention to use it, whether by itself or in combination with any other instrument, device, equipment or apparatus for the purposes of unlawful interception of communications in contravention of section 49 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Ac No.70 of 2002).</p>
<p>(2) Any instrument, device or equipment which is capable of being used to record, monitor or listen to a communication, including but not limited to -</p> <p>(a) telephone wiretaps;</p> <p>(b) long range electronic audio amplified microphones;</p> <p>(c) miniature laser audio transmitters;</p> <p>(d) miniature radio frequency audio transmitters;</p> <p>(e) cellular phone intercepting devices; and</p> <p>(f) miniature sound recording devices,</p> <p>but excluding -</p> <p>(i) any instrument, device, equipment or apparatus, or any component thereof-</p> <p>(aa) which is furnished to a customer by a telecommunication service provider in the ordinary course of his or her business and which is used by the customer in the ordinary course of his or her business;</p> <p>(bb) which is furnished by</p>	

