



Tonga

ELECTRONIC COMMUNICATION ABUSE OFFENCES ACT 2020

Act 23 of 2020



ELECTRONIC COMMUNICATION ABUSE OFFENCES ACT 2020

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ELECTRONIC COMMUNICATION ABUSE OFFENCES ACT 2020

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AN ACT TO REGULATE ELECTRONIC COMMUNICATION ABUSE IN TONGA

I assent,
TUPOU VI,
25th February 2021.

BE IT ENACTED by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

PART 1 – PRELIMINARY

1 Short Title and Commencement

- (1) This Act may be cited as the Electronic Communication Abuse Offences Act 2020.
- (2) This Act shall come into force on a date proclaimed by Cabinet and published in a notice in the Gazette.

2 Interpretation

In this Act, unless the context otherwise requires –

“**abuse**” means –

- (a) being an electronic communication that contain bullying, menacing, harassing, harmful, indecent, and such other material which in the determination of the Court would cause harm to a reasonable person in that person’s situation. For the purposes of this Act, such electronic communications can be heard, seen, or otherwise perceived by any number of persons in Tonga whether publicly or not; and
- (b) The abuse can be by the person who creates, makes or originates an electronic communication, or by the person who shares, re-posts or otherwise distributes the statement, such that the electronic communication is or can be heard, seen or otherwise perceived by the public in Tonga;

“authorised officer” means –

- (a) a police officer who holds a rank of Sergeant or higher; and
- (b) is authorised in writing by the Police Commissioner;

“authorised representative” means -

- (a) the Chief Executive Officer or Managing Director of a service provider or a body corporate of which the service provider is a subsidiary;
- (b) the Company Secretary of a service provider or a body corporate of which the service provider is a subsidiary; or
- (c) an employee authorised, in writing, by the Chief Executive Officer, Managing Director or Company Secretary of a service provider or a body corporate of which the service provider is a subsidiary;

“computer system” means any device or a group of interconnected or related devices, one or more of which, in accordance with a program, performs automatic processing of data;

“communications network” has the meaning given in section 2(1) of the Communications Act;

“content data” means data that forms the content or substance of an electronic communication;

“Court” means the Magistrates Court unless specifically stated to be the Supreme Court of Tonga;

“data” includes information in any form;

“electronic communication” means a communication of information or data in any form by way of guided or unguided electromagnetic energy;

“harm” means –

- (a) any emotional harm, physical harm or mental distress that is more than trivial, caused to a reasonable person in that person’s situation; or
- (b) any fear caused to a reasonable person in that person’s situation about his or her safety or wellbeing, or being caused to believe that violence will be used against them; or

- (c) any fear of losing, or actual deprivation, of freedom, liberty and movement, caused to a reasonable person in that person's situation; or
- (d) provoking, instigating or encouraging hate, ridicule or violence to be carried upon another person;

“identifying information” includes but is not limited to information that identifies a person where that person has an expectation of privacy;

“intimate visual recording” includes but is not limited to –

- (a) means a visual recording that is made in any medium using any device with or without the knowledge or consent of the person who is the subject of the recording, and that is of –
 - (i) a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the person is –
 - (A) naked or has the person's genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments;
 - (B) engaged in an intimate sexual activity; or
 - (C) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
 - (ii) a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts, which is made –
 - (A) from beneath or under a person's clothing; or
 - (B) through a person's outer clothing in circumstances where it is unreasonable to do so; or
 - (iii) depicts a person in a manner that is sexually offensive or grossly indecent; and
- (b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in –
 - (i) a physical form; or
 - (ii) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing;

“Judge” means a Magistrate of the Magistrates Court unless specifically stated to be a Judge of the Supreme Court of Tonga;

“Minister” means minister responsible for communications;

“material” means anything that consists of or contains a post, statement, words, images (moving or otherwise), videos, sounds, articles, messages, expressions, symbols or any other representation, or any combination of these;

“Police Commissioner” means the Commissioner of Tonga Police;

“post an electronic communication” includes but is not limited to transfer, send, post, publish, disseminate, or otherwise communicate by means of electronic communication –

- (a) any information, whether truthful or untruthful, about a person; or
- (b) an intimate visual recording of a person; or
- (c) threatening or abusive or insulting language; or
- (d) identifying information;

“publish”, in relation to an electronic communication means to make or cause to publish an electronic communication available on a computer network such that the electronic communication can be heard, seen or otherwise perceived by any person;

“person” means a natural person, or an individual, and includes any body of persons corporate or unincorporate;

“relevant party”, in relation to an Order, means an individual or entity against which the Order is made;

“serious offence” an offence under this Act is a serious offence for the purposes of Mutual Assistance in Criminal Matters Act;

“service” means a service provided by a service provider;

“service provider” means –

- (a) a person that offers or provides services by means of a computer system or communications network;
- (b) a person that offers or provides services that is accessible in Tonga;
- (c) any other person that processes or stores data on behalf of a service provider or network operator; or
- (d) a network operator under the Communications Act;

“Tonga Police” has the meaning given in section 3 of the Tonga Police Act.

3 Jurisdiction

Unless otherwise provided for under this Act, proceedings may be brought for an offence under this Act –

- (a) if the act or omission is committed –
 - (i) in Tonga;
 - (ii) on board a ship or aircraft registered in Tonga; or
 - (iii) by a person who is in Tonga; and
- (b) whether or not the act or omission constituting the offence is committed in or outside Tonga, if the act or omission –
 - (i) is committed by a subject of Tonga or a citizen of any other country who is ordinarily resident in Tonga;

- (ii) is committed in order to compel the Government of Tonga to do or abstain from doing any act;
- (iii) is committed against a subject of Tonga or any person who is normally a resident of Tonga;
- (iv) is committed by a person who is, after the commission of the offence, present in Tonga;
- (v) is intended to be committed in Tonga; or
- (vi) originates in or transits in Tonga.

PART 2 – OFFENCES

4 Using a service to abuse and cause harm by posting an electronic communication

- (1) A person shall not, either with intent, or with reckless disregard as to the consequences -
 - (a) abuse another person using an electronic communication; and
 - (b) as a result, cause harm to that person, or any other person.
- (2) Any person that contravenes sub-section (1) shall be guilty of a serious offence and shall be liable on conviction to a fine not exceeding \$10,000, or imprisonment not exceeding 3 years, or both.

5 Using a service to bully, menace, harass or cause harm

- (1) A person commits a serious offence if –
 - (a) the person uses a service or attempts to use a service to post an electronic communication;
 - (b) the person does so with the intention or with reckless disregard as to the consequences that the electronic communication be bullying, menacing, harassing or harmful to another person; and
 - (c) posting the electronic communication would be, in all the circumstances, bullying, menacing, harassing or harmful to a reasonable person in the other person’s position.
- (2) In determining whether a reasonable person would consider the posting of an electronic communication would cause harm to a person, the Court may take into account any factor it considers relevant, including the following –
 - (a) the extremity of the language used in the communication;
 - (b) the person’s age and characteristics;
 - (c) whether the communication was anonymous;

- (d) whether the communication was repeated;
 - (e) the extent of circulation of the communication;
 - (f) whether the communication is true or false;
 - (g) the context in which the communication was posted;
 - (h) standards of acceptable behaviour; or
 - (i) the standards of morality, decency and propriety generally accepted by a reasonable person.
- (3) A person that contravenes sub-section (1) shall be guilty of a serious offence and shall be liable on conviction to a fine not exceeding \$10,000, or imprisonment not exceeding 3 years, or both.

6 Enhanced penalty for subsequent offence

A person that is convicted of any repeated serious offence under this Act will be liable to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 5 years, or to both.

PART 3 – CIVIL ACTIONS AND ORDERS

7 Action for statutory tort

- (1) The person who has been harmed under sections 4 and 5 may bring civil proceedings in Court against the defendant.
- (2) Such proceedings, if the Court is satisfied on the balance of probabilities that the defendant has contravened those sections as alleged by the plaintiff, the Court may award such damages in respect of the contravention, having regard of all the circumstances of the case.

8 General provisions applicable to Orders under sections 9 and 10

- (1) Orders may be applied for by a person who has also filed a criminal complaint in relation to the alleged offence.
- (2) The following Orders may be applied for –
 - (a) a stop publication Order; or
 - (b) a disabling Order.
- (3) An Order made under sub-section (2) takes effect –
 - (a) when the Order is served on the respondent, or relevant party;
 - (b) where a Court dispenses with the service of the Order; or

- (c) at such time and under special circumstances as a Court may specify in an Order.
- (4) In circumstances where the Court considers it necessary and expedient, the Court may allow service of an Order to be sent by the applicant, in an electronic form, or by physical service effected by an officer of the Court.
- (5) An Order mentioned in sub-section (2) may be made –
 - (a) in relation to an electronic communication, even if such electronic communication has been amended or removed;
 - (b) be made against a person whether or not that person resides in Tonga;
 - (c) be made against a service provider whether or not the service provider is in or outside Tonga;
 - (d) be made against a relevant party whether or not the relevant party is in or outside Tonga; and
 - (e) require the respondent or relevant party to do, or refrain from doing, an act or omission in or outside Tonga.
- (6) An Order mentioned in sub-section (2) ceases to have effect when the Order expires, or is varied, suspended or cancelled

9 Stop publication Order

- (1) The Court may, on an application by person who has been allegedly harmed by an electronic communication, issue a stop publication Order against any respondent, service provider, or relevant person, as soon as practicable if the Court is satisfied on the balance of probabilities that –
 - (a) the respondent, person, service provider or relevant party has sent, or caused the electronic communication to be communicated on the internet;
 - (b) the electronic communication is an abuse under this Act;
 - (c) is causing harm to the applicant; and
 - (d) it is just and equitable in the circumstances to issue the stop publication Order.
- (2) A stop publication Order may be made against a respondent, service provider or relevant party, even if they did not know or have reason to believe that the electronic communication is an abuse under this Act.
- (3) A stop publication Order may require the respondent, service provider or relevant party, to stop publishing the electronic communication, or to remove the electronic communication, in a form and manner as may be specified in the Order.

10 Disabling Order

- (1) The Court may, on an application by an applicant who has been allegedly harmed by an electronic communication, issue a disabling Order against any respondent, service provider or relevant person, as soon as practicable if the Court is satisfied on the balance of probabilities that –
 - (a) the respondent, service provider or relevant person or party has sent, or caused the electronic communication to be published;
 - (b) the electronic communication is an abuse under this Act;
 - (c) is causing harm to the applicant; and
 - (d) it is just and equitable in the circumstances to issue the disabling Order.
- (2) A disabling Order may be made against a respondent, service provider or relevant person or party, even if they did not know or have reason to believe that the electronic communication is an abuse under this Act.

11 Publication of notices

A person who is required to publish any of the notices of Orders under Part 3, shall ensure that they are –

- (a) conspicuous, regardless of the service used; and
- (b) be easily identified and able to be read, viewed or listen to.

12 Person who may appeal

A person may appeal against the decision made by the Court in relation to any Orders made under this Part, including applying to vary, suspend or cancel an Order, are –

- (a) the applicant for the Order,
- (b) the respondent of the Order; or
- (c) any person, Service Provider or relevant person or party who has been served the Order.

13 Costs

When granting an Order in respect of an electronic communication, the Court may order that the whole or any part of the costs incurred by the respondent, Service Provider and relevant person or party, in complying with the Order, if they are reasonable be paid by any of the following –

- (a) the author of the electronic communication;
- (b) any person either with intent, or with reckless disregard as to the consequences, who publishes the electronic communication; or
- (c) the applicant.

14 Offence of Non- Compliance with Orders

A person who without reasonable excuse fails to comply with an Order made under section 9 or 10 commits an offence and is liable upon conviction to a fine not exceeding \$10,000.

PART 4 – PRODUCTION WARRANT

15 Application for production warrant

- (1) An authorised officer may apply to the Supreme Court for a production warrant to allow access to and disclosure of content data and any associated information or documents in relation to a service used in the commission of an offence under this Act based on the following grounds -
 - (a) the information being sought, and the service accessed should relate to a person engaged in, or suspected on reasonable grounds to be engaged in, the commission of an offence under this Act; and
 - (b) belief that the service that has been used, is being used or is likely to be used by a person referred to under sub- paragraph (a).
- (2) The application shall be sworn by the authorised officer and state the following –
 - (a) the authorised officer’s name, rank and police station;
 - (b) details of the service provider to whom the production warrant applies;
 - (c) the offence or offences to which the application relates;
 - (d) the information or evidence relied upon;
 - (e) a description of the information sought under the production warrant; and
 - (f) information whether a production warrant was previously issued for the same matter.
- (3) The authorised officer shall provide, orally or in writing, any further information the Court requires concerning the grounds on which the production warrant is sought.
- (4) It is a matter for the Court whether the authorised officer need appear before the Court when the Court is considering the application.

16 Application to Magistrate if Supreme Court Judge unavailable

If a Supreme Court Judge is not available to hear an application under this Part for a production warrant, he may appoint a Magistrate to hear the application.

17 Consideration of application for production warrant

- (1) The Court may issue a production warrant to access –
 - (a) content data in a stored form; and
 - (b) any information and documents related to that content.
- (2) In deciding whether there are reasonable grounds for issuing a production warrant, the Court shall –
 - (a) be satisfied that the public interest in the access to and disclosure of the content data substantially outweighs the right to privacy of a person whose privacy may be affected because of the access or disclosure;
 - (b) be satisfied that the person mentioned in section 15 has used, is using or is likely to use the service; and
 - (c) consider relevant matters, including the following –
 - (i) the nature of the data to be disclosed;
 - (ii) the gravity of the conduct being investigated;
 - (iii) the likely usefulness of the data to the investigation;
 - (iv) the reliability of the information on which the application is based, including the nature and source of the information; or
 - (v) whether any conditions should be imposed in relation to the execution of the production warrant.

18 Service provider to be served with a production warrant

- (1) If a production warrant is issued under this Part, the authorised officer to whom the production warrant is issued shall –
 - (a) immediately tell the service provider's authorised representative about the issue of the production warrant ; and
 - (b) as soon as practicable, give the authorised representative a copy of production warrant .
- (2) The service provider shall comply with the requirements of the production warrant forthwith.

19 Content data to be used for lawful purpose only

- (1) The content data disclosed under a production warrant served under section 18 may only be used –
 - (a) for the purpose for which the content data was originally obtained;
 - (b) to enforce an offence under this Act; or
 - (c) for a purpose under the Mutual Assistance in Criminal Matters Act.

- (2) If the Police Commissioner is satisfied that any data obtained under sub-section (1) is no longer useful for a purpose mentioned in sub-section (1), the Commissioner shall arrange for the destruction of any data in the control of the Tonga Police.

PART 5 – OBLIGATIONS OF SERVICE PROVIDERS

20 Obligations of service providers

- (1) A service provider shall do its best to prevent communications networks and facilities from being used in, or in relation to, the commission of offences in this Act.
- (2) A service provider shall give Tonga Police such assistance as is reasonably necessary for the enforcement of this Act.
- (3) A service provider is not liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in performance of a duty imposed by sub-section (1) or (2).
- (4) An authorised representative, employee or agent of a service provider is not liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in connection with an act done or omitted by the service provider as referred to under sub-section (3).
- (5) A service provider who receives a request for information under this Act shall maintain the confidentiality of any procedures and information relating to the request.
- (6) A reference in this section to giving assistance includes, but is not limited to –
 - (a) the provision of services in executing production warrant under this Act;
 - (b) providing relevant information about any communication that is lawfully accessed under a production warrant; or
 - (c) any other reasonably necessary assistance.

21 Service provider offences

- (1) A service provider who fails, without reasonable excuse, to comply with section 20 commits an offence punishable, on conviction, to a fine not exceeding \$20,000.
- (2) A service provider commits an offence if, without reasonable excuse the service provider fails to comply with a request under Part 4 of this Act.
- (3) An offence under sub-section (2) is punishable, on conviction, to a fine not exceeding \$100,000.

22 Terms and conditions on which assistance is to be given

- (1) This section applies if a service provider is required to give assistance to Tonga Police as referred to under section 20.
- (2) The service provider shall comply with the requirement on such terms and conditions as are agreed between the service provider and the Tonga Police.

PART 6 - MISCELLANEOUS**23 Authorised officer may seek assistance**

- (1) An authorised officer exercising a power under this Act may request another person to assist the authorised officer in the exercise of that power.
- (2) A person requested by an authorised officer for assistance in the exercise of a power under this Act shall give the authorised officer the reasonable assistance necessary for the exercise of those powers.

24 Regulations

The Minister responsible for this Act may make regulations for the proper and efficient administration of this Act.

25 Who may prosecute

For the avoidance of doubt, all prosecutions under this Act may be brought by the Attorney General, or by any person aggrieved with prior consent of the Attorney General.

Passed by the Legislative Assembly this 10th day of **December** 2020.