EXPLANATORY STATEMENT

Telecommunications (Interception and Access) Act 1979

Telecommunications (Interception and Access) Amendment (Public Interest Advocate and Other Matters) Regulations 2015

Select Legislative Instrument No. 167, 2015

Introduction

Purpose

1. The *Telecommunications (Interception and Access) Act 1979* (Principal Act) prohibits the Australian Security Intelligence Organisation (ASIO) or enforcement agencies from authorising access to telecommunications data relating to a journalist, or their employer, if a purpose of making the authorisation is to identify a journalist's source, unless a warrant has been obtained (a journalist information warrant).

2. When considering an application for a journalist information warrant, the Principal Act requires that the Minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) be satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source. In making that assessment, the Principal Act provides that the Minister or issuing authority is to have regard to the submissions of a Public Interest Advocate.

3. The *Telecommunications (Interception and Access) Amendment (Public Interest Advocate and Other Matters) Regulations 2015* (Regulations) prescribe matters relating to the performance of the role of a Public Interest Advocate, along with matters necessary or convenient to be prescribed for carrying out or giving effect to the role of the Public Interest Advocate.

4. The Regulations also prescribe the form for a journalist information warrant and update existing stored communications warrant and telecommunications service warrant forms to limit applications for stored communications warrants to 'criminal law enforcement agencies' and amend warrant forms to clarify that interception service warrants can be obtained over multiple persons using a single service, consistent with the Principal Act.

5. The Regulations are made in accordance with subsection 180X(3) and section 300 of the Principal Act. Section 300 provides that the Governor-General may make regulations not inconsistent with the Principal Act prescribing matters required or permitted by the Principal Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Principal Act. Subsection 180X(3) provides that regulations may prescribe matters pertaining to the performance of the role of a Public Interest Advocate.

Operation

6. The Regulations are necessary to:

(a) prescribe matters relating to the performance of the role of a Public Interest Advocate under section 180X(3), and necessary or convenient for carrying out or giving effect to the role of the Public Interest Advocate;

(b) prescribe a form by which an issuing authority issues a journalist information warrant for enforcement agencies;

(c) update the existing telecommunications service warrant forms to clarify that those warrants can be obtained over multiple persons using a single service, consistent with the Principal Act; and

(d) update the existing stored communications warrant form to reflect that from commencement of the *Telecommunications (Interception and Access) Amendment (Data Retention Act) 2015* only defined 'criminal law enforcement agencies' may apply for stored communications warrants.

Financial Impact Statement

7. Public Interest Advocates will be entitled to charge ASIO and enforcement agencies for the time spent in the performance of their role as a Public Interest Advocate. Advocates may charge either a daily rate equivalent to the maximum daily rate at which senior counsel may be engaged without the approval of the Attorney-General (or of the Office of Legal Services Coordination in the Attorney-General's Department, acting as the Attorney-General's delegate), as set out in Appendix D of the *Legal Services Directions 2005*, or at an hourly rate of one-sixth the daily rate. Costs associated with remunerating Public Interest Advocates will be met from within existing agency resources.

8. The amendments to the telecommunications interception and stored communications warrant forms are technical in nature and do not have a financial impact.

Consultation

9. To assist in formulating the Regulations, consultations were undertaken with ASIO, enforcement agencies, selected State Governments and media organisations.

10. Queensland and Victorian Governments were consulted, having regard to the existence of comparable oversight roles in those jurisdictions. ASIO, enforcement agencies and media representatives were consulted to support the development of a robust regime for Public Interest Advocates. Consultation with media representatives included approaching the Australian Press Council, the Media, Entertainment and Arts Alliance and other media organisations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

11. These Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview of the Legislative Instrument

12. The *Telecommunications (Interception and Access) Act 1979* (the Principal Act) enables ASIO to access telecommunications data for the performance of its functions. Similarly it enables enforcement agencies to access telecommunications data for the purposes of enforcing the criminal law, locating missing persons, enforcing a pecuniary penalty or protecting public revenue.

13. The Principal Act, as amended by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (the Data Retention Act), prohibits the Australian Security Intelligence Organisation (ASIO) or enforcement agencies (such as the Australian Federal Police) from authorising access to telecommunications data relating to a journalist or their employer where a purpose of making the authorisation is to identifying a journalist's source, unless a warrant has been obtained (a journalist information warrant).

14. The issuing of a journalist information warrant does not of itself entitle ASIO or an enforcement agency to access any telecommunications data relating to a journalist or their employer to identify a source.

15. Where such a warrant is in force, access to telecommunications data by ASIO under the Principal Act is permitted only where access to the specific telecommunications data in question is in connection with the performance by ASIO of its functions and where it complies with the strict privacy and proportionality obligations under the Attorney-General's Guidelines (made under paragraph 8(1)(a) of the *Australian Security Intelligence Organisation Act 1979*) which relevantly require that:

    - any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence

    - inquiries and investigations into individuals and groups should be undertaken using as little intrusion into individual privacy as is possible, consistent with the performance of ASIO's functions, and

    - wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques.

16. Similarly, access to historical telecommunications data by an enforcement agency under the Principal Act is permitted only where access to the specific telecommunications data in question is reasonably necessary for the following prescribed objectives:

- for the enforcement of the criminal law
- to find a person notified to police authorities as missing, and
- to enforce a law imposing a pecuniary penalty or to protect the public revenue.

17. Even where access to the specific telecommunications data in question is reasonably necessary for a legitimate purpose, the Principal Act further requires that authorised officers of enforcement agencies may only authorise the disclosure of the specific telecommunications data where they are satisfied on reasonable grounds that any interference with the privacy of any person or persons that may result from the disclosure or use is justifiable and proportionate.

18. The decisions of officials of ASIO and enforcement agencies in this regard are subject to independent oversight by the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman, respectively.

19. When considering an application for a journalist information warrant, the Principal Act requires the Minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) to be satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source. In making that assessment, the issuing authority is to have regard to the submissions of a Public Interest Advocate.

20. In the case of ASIO, a journalist information warrant may only be issued by the Minister. In relation to an enforcement agency, only a Judge of a court created by the Parliament, a magistrate or a member of the Administrative Appeals Tribunal who has been appointed by the Attorney-General under the Principal Act may issue a warrant.

21. The Regulation sets out process requirements for applying for a journalist information warrant, including: ensuring the Advocate is given a copy of proposed warrant requests in all but limited circumstances; setting out the way in which Advocates may deal with requests; the preparation and lodgement of submissions and attendance at oral applications; and the return of classified material.

22. Matters relating to the performance of the role of a Public Interest Advocate are set out in Part 4, Division 2 of Schedule 1 of this Regulation, including:

- requiring that the Prime Minister may only appoint classes of persons as Public Interest Advocate who are former judges of Commonwealth Chapter III courts or of State or Territory superior courts, or security-cleared Senior Counsel or Queen's Counsel
- providing for a fixed term of appointment of up to five years (with an option for reappointment), with limited grounds for termination, and
- providing for remuneration at a rate that is likely to be sufficient to attract candidates with appropriate experience and expertise.

23. These conditions of appointment ensure that Public Interest Advocates are appropriately qualified and sufficiently independent from the Executive.

24. Items 9 and 10 of the Regulations, being the prescription of updated telecommunications service warrant and stored communications warrant forms, and of a new journalist information warrant form, are technical in nature and do not alter or affect the operation of the Principal Act and as such do not engage any human rights.

25. This Regulation is made in accordance with subsection 180X(3) and section 300 of the Principal Act. Section 300 provides that the Governor-General may make regulations, not inconsistent with the Principal Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subsection 180X(3) provides that regulations may prescribe matters pertaining to the performance of the role of a Public Interest Advocate.

26. To assist in formulating the Regulations, consultations were undertaken with ASIO, enforcement agencies, selected State Governments and media organisations. Queensland and Victorian Governments were consulted having regard to the existence of comparable oversight roles in those jurisdictions. ASIO, enforcement agencies and media representatives were consulted to support the development of a robust regime for Public Interest Advocates. Consultation with media representatives included approaching the Australian Press Council, the Media, Entertainment and Arts Alliance and other media organisations.

Human rights implications

27. The Regulations engage the following rights:

- the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), and

- the right to freedom of expression in Article 19(2) and 19(3) of the ICCPR.

Article 17 of the ICCPR – right to protection against arbitrary and unlawful interferences with privacy

28. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence and that everyone has the right to the protection of the law against such interference or attacks. For interference with privacy not to be arbitrary it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality to the end sought and necessity in the circumstances.

29. Sections 180G and 180H of the Principal Act prohibit ASIO and enforcement agencies from making historical or prospective authorisations to access journalists' or their employers' data to identify a journalist's source unless a journalist information warrant is in force. The regime requires that the Minister or issuing authority be satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the

confidentiality of the identity of the source before a warrant may be issued, and accordingly provides assurance that competing public interests have been considered and appropriately weighed. To further address those public interests, the Principal Act requires that prior to issuing a warrant, an issuing authority must have regard to any submissions of a Public Interest Advocate.

30. A Public Interest Advocate represents the 'public interest' in this regime. Their role is to review requests and applications made by ASIO and enforcement agencies for journalist information warrants, and to make submissions to the Minister (in the case of requests by ASIO), and to Part 4-1 issuing authorities (in the case of applications by enforcement agencies) in relation to whether the warrant should be issued and in relation to whether any conditions or restrictions (access requirements) should be imposed on the warrant. These requirements ensure that any interference with the privacy of any person or persons that may result from disclosing telecommunications data would be lawful, justifiable and proportionate.

31. The Regulations strengthen the procedural safeguards that apply to the journalist information warrant regime by:

- providing that only the most senior members of the legal profession, being Senior Counsel, Queen's Counsel, former Commonwealth judges, or former State or Territory superior court judges, may be appointed as Public Interest Advocates, ensuring that Advocates are likely to be persons of the highest integrity and impartiality, and with extensive experience in making public interest arguments

- requiring that agencies provide a Public Interest Advocate with a copy of a proposed request or application for a journalist information warrant or notify a Public Interest Advocate prior to making an oral application

- enabling Public Interest Advocates to receive further information provided to the Minister or issuing authority by agencies beyond that contained in the request or application, and to prepare new or updated submissions based on that information, and

- placing decisions about any exceptions from the above requirements in the hands of the Public Interest Advocates, Minister or issuing authorities, rather than in the hands of the agencies.

32. Access to telecommunications data by ASIO is subject to independent oversight by the Inspector-General of Intelligence and Security. The Data Retention Act substantially enhances the powers and responsibilities of the Commonwealth Ombudsman to oversight access to telecommunications data by Commonwealth, State and Territory enforcement agencies.

33. The Regulations promote privacy and are compatible with Article 17 of the ICCPR because they facilitate independent scrutiny of applications for warrants enabling access to data in certain circumstances. The Regulations prescribe criteria for appointment of Public Interest Advocates that ensure the Advocates are appropriately skilled and independent and able to advocate in the public interest. To the extent that the issuing of a

warrant itself entails a limitation on the right to privacy that limitation is reasonable, necessary and proportionate.

Article 19(2) and 19(3) of the ICCPR – freedom of expression

34. Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds. However, the right to freedom of expression carries special duties and responsibilities and may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary for specified purposes including the protection of national security or public order. The protection of public order includes law enforcement.

35. This legislative instrument does not limit the right to freedom of expression. Rather, the journalist information warrant and the Public Interest Advocate regimes seek to promote the protection of freedom of expression by requiring security and law-enforcement agencies to apply for a warrant before accessing a journalists' or their employers' telecommunications data where a purpose is to identify a source. The Regulations support those protections by prescribing relevant process requirements and criteria necessary to enable the functioning of Public Interest Advocates.

36. A journalist's right to protect confidential information is derived from the right to freedom of expression and is a fundamental tenet of an open and unimpeded press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. The existence of robust oversight of authorisation requests protects against access to source information occurring in a way which is inconsistent with the assurances of confidentiality that may be given by a journalist to a source save where the public interest outweighs the maintenance of confidentiality. Independent authority, through the creation of journalist information warrants issued by a judicial officer or AAT member minimises the potential for deterring sources from actively assisting the press to inform the public on matters of public interest and ensures that the freedom of the press is not adversely affected by the measure.

37. The Regulations promote freedom of expression and are compatible with Article 19 of the ICCPR because they strengthen the procedural safeguards that apply to agencies seeking access to information for the purpose of identifying a source. In addition, the introduction of a Public Interest Advocate supports the right to freedom of expression by requiring the balancing of competing public interests between disclosure of information for national security and law enforcement purposes and the protection of confidential sources which support freedom of expression. To the extent that the issuing of a journalist information warrant limits the right to freedom of expression, the regime ensures that those limitations are reasonable, necessary and proportionate.

Conclusion

38. The legislative instrument is compatible with human rights given it promotes the protection of human rights, specifically the rights to privacy and freedom of expression and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON SECTIONS

Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015

Details of the proposed *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015*

Regulation 1—Name of Regulations

39. Regulation 1 provides that this Regulation is the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015.*

Regulation 2—Commencement

40. Regulation 2 provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3—Authority

41. Regulation 3 provides the instrument is made under the *Telecommunications (Interception and Access) Act 1979* (the Principal Act).

Regulation 4—Schedules

42. Regulation 4 provides that each Regulation or Form that is specified in a Schedule to these Regulations is amended or repealed as described in the items in each Schedule. Existing Regulation 2AB and Forms 1 and 2 have been repealed, in the case of Regulation 2AB to allow for renumbering of the preliminary Regulations and in the case of Forms 1 and 2 to enable the replacement of those Forms with amended versions. Amendments have been made to support the newly created statutory role of Public Interest Advocate

Schedule 1 - Amendments

[Item 1] Before Regulation 1

43. This inserts headings for Part 1 and Division 1.

[Item 2] Regulation 1A

44. This item provides that the Regulations are made under the Principal Act.

[Item 3] Regulation 2

45. This item provides a new definition for *paid work* into the Principal Regulations.

[Item 4] Regulation 2AB

46. This item repeals Regulation 2AB. Regulation 2AB had the effect of prescribing section 7 of the *Serious Crime Control Act* (NT) for the purposes of paragraph (b) of the definition of *criminal organisation* in the Principal Act. A range of criminal offences relating to *criminal organisations* are *serious offences* within the meaning of the Principal Act, for which interception agencies may apply for and obtain interception warrants under Part 2-5 of the Principal Act. The repeal of Regulation 2AB reflects the renumbering of items to ensure clarity and consistency in the Regulations. Regulation 2AB is remade by item 5 of the Regulations and numbered 2B

[Item 5] After Regulation 2A

47. This item inserts the heading 'Part 2—Interception of telecommunications'.

48. This Regulation reinstates former Regulation 2AB, repealed at item 4, prescribing section 7 of the *Serious Crime Control Act* (NT) for the purposes of paragraph (b) of the definition of *criminal organisation* in the Principal Act. A range of criminal offences relating to *criminal organisations* are *serious offences* within the meaning of the Principal Act, for which interception agencies may apply for and obtain interception warrants under Part 2-5 of the Principal Act.

49. This item also inserts the heading 'Part 3—Prescribed forms for warrants' and subheading 'Division 1—Telecommunication service warrants, issue of named person warrants and entry on premises warrants'.

[Item 6] Before Regulation 4

50. This item inserts the heading 'Division 2—Stored communication warrants'.

51. The combined effect of Regulations 4, 5 and 6 is to rename Regulation 2AB as Regulation 2B, and relocate it to within the new Part 2 of the Regulations, entitled 'Interception of telecommunications'.

[Item 7] After Regulation 4

52. This item inserts a new 'Division 3—Journalist information warrants' and new Regulation 5, which prescribes Form 7 in Schedule 3 for the purposes of subsection 180U(1) of the Principal Act. The effect of this item is to specify the form that must be used to apply for a journalist information warrant under the Principal Act. The Regulations prescribe the form to be used at item 9.

53. This item also inserts a new Part 4 of the Regulations, entitled 'Access to telecommunications data'. This contains new Regulations 6 to 21, dealing with journalist information warrants and Public Interest Advocates.

54. This item also inserts consequential provisions enabling the Governor-General to make arrangements with States and Territories with respect to the administration of provisions of the Principal Act and the Regulations in relation to journalist information warrants. Regulation 21 enables State office holders to be declared as Public Interest Advocates and

for arrangements to be entered into to facilitate the performance by State office holders of the role of Public Interest Advocate.

55. Item 7 also inserts a new Part 5 into the Regulations, entitled 'Application and transitional provisions' that contains new Regulation 22 and 23. Each of the Regulations inserted by item 7 is described below.

New Part 4—Access to telecommunications data

New Division 1—Journalist information warrants

Regulation 6—Public Interest Advocate to be given proposed journalist information warrant requests made by the Director-General of Security

56. Section 180J of the Principal Act provides that the Director-General of Security (Director-General) may request the Minister to issue a journalist information warrant in relation to a particular person.

57. Subregulation 6(1) requires that, before requesting a journalist information warrant under section 180J of the Principal Act, the Director-General must give a copy of the proposed request to a Public Interest Advocate.

58. This requirement implements an undertaking given by the Attorney-General, Senator the Hon George Brandis QC, during the consideration-in-detail of the then *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Data Retention Bill) that Regulations would include a requirement that agencies notify a Public Interest Advocate prior to making a request or application for a journalist information warrant.

59. Such a requirement is necessary to ensure that Public Interest Advocates are aware of each request, and are therefore able to prepare submissions under paragraph 180X(2)(a) of the Principal Act for the Minister to have regard to under subparagraph 180L(2)(b)(v) of the Principal Act.

60. Subregulation 6(1) additionally limits the range of Public Interest Advocates to whom the Director-General may give a proposed request, being Public Interest Advocates who:

    (a) hold an equivalent security clearance to that of an *ASIO employee* (within the meaning of the Principal Act and the *Australian Security Intelligence Organisation Act 1979*); or

    (b) a former judge of a Chapter III court, or of a State or Territory superior court.

61. Subparagraph 13(1)(a) provides that the Prime Minister must be satisfied that a Queen's Counsel or Senior Counsel has been cleared for security purposes to a level that the Prime Minister considers 'appropriate' before declaring the person to be a Public Interest Advocate. In practice, this may result in different Advocates holding clearances at different levels, depending on the likely classification of applications that each Advocate is likely to review. However, in the case of warrant applications by ASIO it will be appropriate that consideration of the application is limited to those Public Interest Advocates that either hold a security clearance equivalent to an *ASIO employee* or are former superior court justices to ensure that sensitive information is appropriately

protected, and only a limited number of Public Interest Advocates will be required to undergo the more rigorous security clearance process required for *ASIO employees*. In particular, subregulation 6(1) will ensure that the Director-General will not be required, as a result of the operation of subregulation 6(2), to give a proposed request to an Advocate who is not cleared to review highly sensitive information.

62. Subregulation 6(2) provides that, if a copy of a proposed request is given to a Public Interest Advocate, as required under subregulation 6(1), and the Advocate advises that he or she is unable to prepare a submission in relation to the proposed request for any reason, the Director-General must ensure that a copy of the proposed request is given to another Public Interest Advocate. The purpose of this requirement is to ensure that the proposed request is given to an Advocate who is able to consider it. In the rare circumstance that the proposed request has been given to all Public Interest Advocates who meet the requirements of subregulation 6(1), subregulation 6(2) should not be interpreted as requiring the Director-General to continue giving the proposed requests to those Advocates where it would be futile to do so.

63. The Minister has a discretion to refuse to issue a journalist information warrant, under section 180L of the Principal Act. This discretion would extend, for example, to circumstances where a request has been made without a submission if no Public Interest Advocates were available, where the Minister considers that, in all the circumstances, the request should not be granted until a Public Interest Advocate has become available and prepared a submission. Conversely, it would be open to the Minister to issue a warrant in the rare circumstance that no Public Interest Advocates are able to prepare a submission, or in exigent circumstances where a submission has not been prepared.

64. Regulation 6 relies on the 'necessary and convenient' power in subsection 300(1)(b) of the Principal Act. Regulation 6 is necessary to enable a Public Interest Advocate to make submissions as they are permitted to do so pursuant to section 180X(2) of the Principal Act. The Regulation also enables the Minister to have regard to any submissions made by a Public Interest Advocate as required by subparagraph 180L(2)(b)(v) of the Principal Act by facilitating the making of such submissions and prescribing the circumstances and manner in which applications are provided to Public Interest Advocates. Accordingly, Regulation 6 is necessary to give effect to the Principal Act.

Regulation 7—Public Interest Advocate to be given proposed journalist information warrant applications by an enforcement agency

65. Section 180Q of the Principal Act provides that an enforcement agency may apply to a *Part 4-1 issuing authority* (within the meaning of the Principal Act) for a journalist information warrant in relation to a particular person.

66. Subregulation 7(1) requires that, before making a *written* application for a journalist information warrant under section 180Q of the Principal Act, the person must give a copy of the proposed application to a Public Interest Advocate.

67. Subregulation 7(2) requires that, before making an *oral* application for a journalist information warrant under section 180Q of the Principal Act, the person must notify a Public Interest Advocate. Subsection 180Q(5) of the Principal Act provides that an application may be made 'in writing or in any other form'. The term 'oral application'

includes any form of oral communication, such as applications made in person, or via telephone or video-conference.

68. The requirements under subregulations 7(1) and (2) implement an undertaking given by the Attorney-General, Senator the Hon George Brandis QC, during the consideration-in-detail of the Data Retention Bill that the regulations would include a requirement that agencies notify a Public Interest Advocate prior to making a request or application for a journalist information warrant. Such a requirement is necessary to ensure that Public Interest Advocates are aware of each application, and are therefore:

    - *(in the case of written applications)* able to prepare submissions under paragraph 180X(2)(a) of the Principal Act for the Part 4-1 issuing authority to have regard to under subparagraph 180T(2)(b)(v) of the Principal Act; and

    - *(in the case of oral applications)* able to attend the application hearing to make oral submissions under paragraph 180X(2) of the Principal Act for the Part 4-1 issuing authority to have regard to under subparagraph 180T(2)(b)(v) of the Principal Act.

69. Subregulation 7(3) provides that, if a copy of a proposed application is given to a Public Interest Advocate, as required under subregulation 7(1) and the Advocate advises that he or she is unable to prepare a submission in relation to the proposed application for any reason, the person making the application must ensure that a copy of the proposed application is given to another Public Interest Advocate. This subregulation imposes a requirement to notify another Public Interest Advocate of a proposed oral application where the previously-notified Advocate has advised they are unable to attend the hearing of the application. The purpose of this requirement is to ensure that the proposed application is given or notified to an Advocate who is able to consider it. In the rare circumstance that the proposed application has been given or notified to all Public Interest Advocates, subregulation 7(3) should not be interpreted as requiring the person to continue giving or notifying the proposed application to those Advocates where it would be futile to do so.

70. Issuing authorities have a discretion to refuse to issue a journalist information warrant, under section 180T of the Principal Act. This discretion would extend, for example, to circumstances where an application has been made without a submission as no Public Interest Advocates were available, but where the issuing authority considers that, in all the circumstances, the application should not be granted until a Public Interest Advocate has become available and prepared a submission. Conversely, it would be open to the issuing authority to issue a warrant in the rare circumstance that no Public Interest Advocates are able to prepare a submission, or in exigent circumstances where a submission had not been prepared.

71. Similar to Regulation 6, Regulation 7 relies on the 'necessary and convenient' power in subsection 300(1)(b) of the Principal Act. Regulation 7 is necessary to enable a Public Interest Advocate to make a submission as they are permitted to do so pursuant to section 180X(2) of the Principal Act. The Regulation also enables a Part 4-1 issuing authority to have regard to any submissions made by a Public Interest Advocate as required by subparagraph 180T(2)(b)(v) of the Principal Act by facilitating the making of such submissions and prescribing the circumstances and manner in which applications are provided to Public Interest Advocates. Accordingly, Regulation 7 is necessary to give effect to the Principal Act.

Regulation 8—Public Interest Advocate to deal with proposed journalist information warrant requests and applications

72. Subregulation 8(1) provides that upon receiving a request or written application, the Public Interest Advocate may consider the request or application and, as soon as reasonably practical, advise the agency requesting or applying for a journalist information warrant, that:

    (a) he or she will prepare a submission in relation to the request or application; or

    (b) he or she is unable to consider the proposed request or application—for example, because the Public Interest Advocate is unavailable due to other commitments, or because the Public Interest Advocate would face a conflict of interest in considering the particular proposed request or application.

73. Subregulation 8(2) mirrors subregulation 8(1) in relation to proposed oral applications for journalist information warrants by enforcement agencies.

74. Subregulation 8(3) addresses the situation where a Public Interest Advocate is given further information under subregulations 9(6) or 10(5). The effect of subregulation 8(3) is that the Public Interest Advocate will be required to consider the further information as if it were a proposed request or application and, as soon as reasonably practical, advise the agency requesting or applying for a journalist information warrant that:

    (a) he or she will prepare a submission in relation to the request or application; or

    (b) he or she is unable to consider the proposed request or application—for example, because the Public Interest Advocate is unavailable due to other commitments, or because the Public Interest Advocate would face a conflict of interest in considering the particular proposed request or application.

75. Subregulations 9(6), (7) and (8) deal with the preparation of a new or updated submission by a Public Interest Advocate who has agreed to consider further information relating to a request or application for a journalist information warrant. This is discussed below.

Regulation 9—Public Interest Advocate to prepare submissions

76. Subregulation 9(1) requires a Public Interest Advocate to prepare a submission relating to a proposed request or application for a journalist information warrant within a reasonable period, but not later than 7 days after being given the proposed request or application.

77. Subregulation 9(2) requires the submission to include all facts and considerations the Public Interest Advocate considers would likely be relevant to either the Minister (in the case of *requests* by the Organisation) or the Part 4-1 issuing authority (in relation to *applications* by an enforcement agency) in relation to:

    (a) the decision whether to issue a journalist information warrant (including any facts and considerations which support the conclusion that a journalist information warrant should not be issued); or

    (b) the decision about the imposition of any conditions or restrictions in the warrant.

78. Subregulations 9(2) and (3) will ensure that the Public Interest Advocate puts to the Minister or Part 4-1 issuing authority all facts and considerations that he or she considers relevant to the decision about whether or not to issue or refuse to issue a journalist information warrant or impose any conditions or restrictions. This requirement will not limit the Public Interest Advocate from including other information in submissions, but additionally requires the Public Interest Advocate to address any facts or considerations not adequately dealt within the Director-General's request or enforcement agency's application.

79. Subregulation 9(3) ensures that the ability of the Public Interest Advocate to make submissions is not limited, and nothing in the regulation would prevent the Public Interest Advocate from addressing matters already covered in the request or application.

80. Subregulation 9(4) requires the Public Interest Advocate to take into account the following in determining what is a reasonable time to prepare a submission:

    (a) the time that could reasonably be expected to be required to prepare a submission—which would incorporate consideration of the complexity of the proposed request or application, and the issues raised;

    (b) the gravity of the matter in relation to which the proposed request or application relates;

    (c) the urgency of the circumstances in which the proposed request or application is made; and

    (d) any other matter that the Public Interest Advocate considers relevant.

81. Subregulation 9(5) requires a Public Interest Advocate to provide a copy of his or her written submission to the Director-General, in the case of ASIO, or in the case of an enforcement agency to either the person who made the application or, if the Advocate does not know the identity of the applicant or the applicant is unavailable, to the chief officer of the enforcement agency. This requirement enables those agencies to attach a copy of the submission to the request or application, and is intended to facilitate the efficient consideration of the warrant request and application processes by ensuring that agencies are able to provide the Minister or issuing authority, as the case may be, with all relevant documents as part of their request or application.

82. Subregulations 9(6), (7) and (8) deal with the preparation of a new or updated submission by a Public Interest Advocate who has agreed to consider further information relating to a request or application for a journalist information warrant. Subregulation 9(6) requires a Public Interest Advocate to prepare a new submission, or update a previous submission on the application, taking into account the additional information provided by the agency. Subregulation 9(7) requires that the Public Interest Advocate must prepare any new or updated submission in accordance with subregulation 9(1) and do so within a reasonable period, but no later than seven days after being given the further information or summary. Subregulation 9(8) will ensure that in providing an additional or updating a previous submission, the Public Interest Advocate includes all facts and circumstances that they consider relevant in relation to that additional material for the consideration of the Minister or Part 4-1 issuing authority.

83. Subregulation 9(9) provides discretion for the Minister or issuing authority to consider late submissions or updated submissions from a Public Interest Advocate where that Advocate has not been able to meet the 7 day timeframe provided for in regulation 9(1) or (7).

Regulation 10—Public Interest Advocate's attendance at hearing of oral application for proposed journalist information warrant

84. Subregulation 10(1) provides for a Public Interest Advocate's attendance at a hearing of an oral application for a journalist information warrant by an enforcement agency under subsection 180Q(5) of the Principal Act. This includes the ability for a Public Interest Advocate to attend the hearing by telephone or other means of voice communication (for example, by video conference), and to make oral submissions to the issuing authority in the presence of the relevant enforcement agency.

85. Subregulation 10(2) provides for submissions by the Public Interest Advocate to be made in the presence of the relevant enforcement agency.

86. Similar to written applications, subregulation 10(3) requires a Public Interest Advocate to include all facts and considerations the Public Interest Advocate considers would likely be relevant to either the Minister (in the case of *requests* by the Organisation) or the Part 4-1 issuing authority (in relation to *applications* by an enforcement agency) in relation to:

    (a) the decision whether to issue a journalist information warrant (including any facts and considerations which support the conclusion that a journalist information warrant should not be issued); or

    (b) the decision about the imposition of any conditions or restrictions in the warrant.

87. Subregulation 10(3) will ensure that the Public Interest Advocate puts to the Part 4-1 issuing authority all facts and considerations that he or she considers relevant to the decision about whether or not to issue or refuse a journalist information warrant or impose any conditions or restrictions. This requirement will not limit the Public Interest Advocate from including other information in submissions; but additionally requires the Public Interest Advocate to address any facts or considerations not adequately addressed within the enforcement agency's application.

88. Subregulation 10(4) ensures that the ability of the Public Interest Advocate to make submissions is not limited, and nothing in the regulation would prevent the Public Interest Advocate from addressing matters already covered in the request or application.

Regulation 11—Further information, or copy or summary of information, to be given to Public Interest Advocate

89. Sections 180K and 180R of the Principal Act enable the Minister or a Part 4-1 issuing authority, respectively, to require that an agency provide him or her with further information relating to a request or application for a journalist information warrant.

90. Where the Minister or issuing authority requires an agency to provide further information, Regulation 11 gives the Minister or Part 4-1 issuing authority the discretion to also require the agency to provide that information to a Public Interest Advocate. Regulations

8, 9 and 10 contain related provisions that would apply where a Public Interest Advocate is given such information.

91. Where the Minister or issuing authority has been given further information in writing, paragraphs 11(1)(a) and (3)(a) provide that the Minister or issuing authority may require that information, or a copy of it, to be given to a Public Interest Advocate. Where the Minister or issuing authority have been given further information orally, paragraphs 11(1)(b) and (3)(b) provide that the Minister or issuing authority may require that the information, or a *summary* of it, be given to the Public Interest Advocate, and may require the information or summary thereof to be given in a particular form—either orally or in another form, such as in writing. The ability of the Minister or issuing authority to require the Director-General or an enforcement agency to provide a Public Interest Advocate with a summary of further information that has been given orally reflects the practical reality that it may be challenging for the Director-General or agency to provide the Advocate with a *verbatim* transcript or restatement of the information.

92. The power to require the Director-General or an enforcement agency to give further information, under sections 180K and 180R of the Principal Act, has a wide range of potential applications, ranging from enabling the Minister or issuing authority to clarify minor and/or technical details in a request or an application, through to requiring the Director-General or agency to provide further information in support of the request or application. The purpose of providing the Minister and issuing authority with a discretion to require the Director-General or agency to also provide the further information to a Public Interest Advocate, as opposed to requiring the Director-General or agency to do so in all cases, is to enable the Minister and issuing authorities to account for circumstances where, for example:

- the further information would not likely materially affect any public interest considerations relevant to the decision to issue a journalist information warrant, such as where the further information is trivial or technical in nature;

- the Public Interest Advocate's submission draws a conclusion that is expressed as being based on a particular assumption, and the further information merely confirms that assumption; or

- the matter is sufficiently serious and urgent that, on balance, it is desirable to proceed immediately to decide whether to issue the warrant.

93. This discretion reflects the underlying purpose of the Public Interest Advocate scheme, being to ensure that relevant public interest considerations are brought to the relevant issuing authority's attention as part of the request or application for a journalist information warrant. The scheme is not intended to impose procedural barriers to requests or applications.

94. The Minister's and issuing authorities' power to require an agency to provide further information to a Public Interest Advocate is discretionary, enabling them to make a decision that is appropriate in light of all of the relevant circumstances and considerations. However, when considering whether to exercise this power, subregulations 11(2) and (4) provide that the Minister or issuing authority may have regard to:

(a) the extent to which further information would be likely to be relevant to a Public Interest Advocate's preparation of a new submission, or the updating of his or her submission, relating to the request or application; and

(b) the gravity of the matter in relation to which the request or application relates; and

(c) the urgency of the circumstances in which the request or application is being made; and

(d) any other matter that the Minister or issuing authority considers relevant.

95. The purpose of these subregulations is to provide guidance to the Minister and issuing authorities about the kinds of matters that should generally be taken into account when considering whether to require the Director-General or enforcement agency to revert back to a Public Interest Advocate with further information.

Regulation 12—Public Interest Advocate to return proposed journalist information warrant requests and applications

96. Regulation 12 requires a Public Interest Advocate to return to the requesting agency any documents relating to requests or applications for journalist information warrants.

97. The Regulation includes the requirement to return any requests, applications, submissions, documents, copies or extracts relating to the application or request. This requirement will ensure that all sensitive material, including working drafts or notes, are required to be returned and appropriately ensures the ongoing protection of that information. This is similar to requirements in a range of Commonwealth and State legislation, including:

- subsection 32(3) of the *Australian Security Intelligence Organisation Act 1979* and subsection 15(3) of the Principal Act, which require the Minister to return requests for warrants to the Director-General;

- subsection 10(3) of the *Telecommunications Interception Act 2009* (Qld), which requires the Queensland Public Interest Monitor to return any documents relating to a warrant application to the applicant agency; and

- subsection 4D(3) of the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) which requires the Victorian Public Interest Monitor to return any documents relating to a warrant application to the applicant agency.

Division 2—Public Interest Advocates

Regulation 13—Eligibility for appointment

98. Subregulation 13(1) provides eligibility criteria that the Prime Minister must be satisfied of before declaring a person to be a Public Interest Advocate. A Public Interest Advocate must be:

- a Senior Counsel or Queen's Counsel who has a security clearance to a level that the Prime Minister considers appropriate;

- a former judge of the High Court of Australia or a court that is or was created by the Parliament under Chapter III of the Constitution (collectively referred to as Chapter III courts); or

- a former judge of a State or Territory Supreme Court or District Court (or equivalent, such as the Victorian County Court) (collectively referred to as State or Territory superior courts).

99. Silks and former members of the judiciary are generally recognised as being persons of the highest integrity and impartiality and have extensive training in reviewing complex materials, such as warrant applications, supporting affidavits, and in formulating and making public interest arguments.

100. The reference to a 'court that… was created by the Parliament under Chapter III of the Constitution' is intended to include former courts.

101. Subregulation 13(2) provides that certain classes of person must not be declared as Public Interest Advocates. Most significantly, paragraph 13(2)(e) provides that persons employed by the Commonwealth, a State or Territory must not be appointed. Government employees might face a conflict of interest in the performance of the functions of a Public Interest Advocate, notwithstanding their being appointed in their personal capacity.

102. Subregulation 13(2) does not preclude the appointment of persons who hold statutory or non-statutory offices under the Commonwealth, a State or Territory, in recognition of the fact that Senior Counsel, Queen's Counsel and former members of the judiciary are often appointed to a range of public offices, such as inquiries, reviews, advisory panels and councils. Imposing a prohibition on a person who holds such offices being appointed as an Advocate would significantly limit the range of candidates eligible to be appointed. Senior Counsel, Queen's Counsel and former members of the judiciary are generally recognised as being persons of the highest integrity, with extensive experience in appropriately managing conflicts of interest (real or apparent).

103. Subregulation 13(2) does exclude persons holding certain statutory offices from being appointed as Public Interest Advocates, regardless of whether the person is a Senior Counsel, Queen's Counsel or former member of the judiciary. The listed public offices represent offices that would likely pose an inherent and irreconcilable conflict of interest (real or apparent) to the performance of the role of a Public Interest Advocate. The list is not intended to be exhaustive, and other persons falling outside those categories may nevertheless be otherwise unsuitable for appointment.

Regulation 14—Term of appointment

104. Regulation 14 provides that Public Interest Advocates may be declared for a fixed term of up to five years in duration. A person may be re-appointed as a Public Interest Advocate, in accordance with section 33AA of the *Acts Interpretation Act 1901*.

Regulation 15—Remuneration

105. Regulation 15 provides for the remuneration of Public Interest Advocates.

106. Subregulations 15(1) and (2) provide that Public Interest Advocates may charge agencies for the time spent in performing their functions. This can include but is not limited to reviewing requests and applications, liaising with the agency applying for the warrant, preparing submissions, attending applications and preparing new or updated submissions when additional information is needed. The cost is to be borne by the agency.

107. Subregulation 15(3) provides that Public Interest Advocates may charge a daily rate equivalent to the maximum daily rate at which senior counsel may be engaged, without the approval of the Attorney-General (or of the Office of Legal Services Coordination in the Attorney-General's Department, acting as the Attorney-General's delegate) in accordance with Appendix D of the *Legal Services Directions 2005*. Alternatively, the Advocate may charge an hourly rate of one-sixth the daily rate, if the amount of time is less than 6 hours in a single day.

108. Public Interest Advocates are not counsel engaged on behalf of the Commonwealth, or Commonwealth agencies, and so are not directly covered by the *Legal Services Directions 2005*. However, the Directions offer an established framework for the Commonwealth's engagement of legal professionals. In the context of the Public Interest Advocate role, the Directions provide a benchmark for appropriate remuneration.

109. The setting of fixed daily and hourly rates for Public Interest Advocates is appropriate for Public Interest Advocates, being former superior court judges or senior members of the legal profession, working on an infrequent and *ad hoc* basis, and potentially at short notice, and reflects the need to ensure a rate commensurate with the appointment of senior members of the legal profession as Public Interest Advocates.

110. Setting a fixed rate of remuneration for Public Interest Advocates, rather than allowing each Advocate to negotiate a rate on a standing or case-by-case basis, reflects the need to ensure a consistent rate of remuneration across all Public Interest Advocates, so as to avoid creating an adverse incentive for agencies to approach Advocates who charge at a lower rate.

111. The incorporation of the *Legal Services Directions 2005* ensures that the remuneration of Public Interest Advocates remains commensurate to that of other senior members of the legal profession engaged by the Commonwealth. In addition, this ensures that the remuneration of Public Interest Advocates keeps pace with any changes to remuneration of Commonwealth counsel as prescribed under the Directions from time-to-time.

Regulation 16—Disclosure of interests to the Minister

112. Regulation 16 requires Public Interest Advocates to give written notice to the Prime Minister of all interests, pecuniary or otherwise, that they have or acquire, that gives rise to an actual or potential conflict with the proper performance of their functions. This requirement supports the integrity of the Public Interest Advocate regime.

Regulation 17—Conflict of interest

113. Subregulation 17(1) requires that if a Public Interest Advocate believes that he or she has a conflict of interest, the Public Interest Advocate is to take reasonable steps to avoid

any real or apparent conflict of interest in connection with the proper performance of his or her functions in that role. The purpose of Regulation 17 is to support the integrity of the role of Public Interest Advocate.

114. Should the Public Interest Advocate believe he or she has a real or apparent conflict of interest in relation to the subject-matter of the proposed request or application, subregulation 17(2) requires a Public Interest Advocate to advise an applicant for a journalist information warrant that:

- *(in the case of a proposed request or written application)* he or she is unable to prepare a submission in relation to the proposed request or written application; or

- *(in the case of a proposed oral application)* he or she is unable to attend the hearing of the application.

115. Queen's Counsel and Senior Counsel routinely manage conflicts of interest in accordance with well-established professional rules. Accordingly, Regulation 17 does not, of itself, prohibit a Public Interest Advocate from merely engaging in paid work for or on behalf of a media organisation or Government agency from time-to-time. Rather, Regulation 17 is intended to mirror the professional obligation on legal professionals to appropriately manage real and apparent conflicts on a case-by-case basis, in all of the circumstances.

Regulation 18—Resignation

116. Regulation 18 allows a Public Interest Advocate to submit his or her written resignation to the Prime Minister. The resignation would take effect on the day it is received by the Prime Minister, or if a later day is specified in the written resignation, on that later day.

Regulation 19—Termination of appointment

117. Subregulation 19(1) prescribes the circumstances in which the Prime Minister may revoke the declaration of a Public Interest Advocate.

118. Subregulation 19 (2) identifies the circumstances in which the Prime Minister must revoke the declaration of a Public Interest Advocate. For example, the Prime Minister would be required to revoke the declaration of a Public Interest Advocate who becomes bankrupt or ceases to meet the criteria for declaration as a Public Interest Advocate under subregulation 13(1).

Regulation 20—Immunity from legal action

119. Regulation 20 provides that a Public Interest Advocate is protected against civil liability for an act done, or an omission made, in good faith in the performance of their functions.

Division 3—Miscellaneous

Regulation 21—Arrangements with States and Territories

120. Regulation 21 provides that the Governor-General may make arrangements with the Governor of a State, the Chief Minister of the Australian Capital Territory, or the Administrator of the Northern Territory, in connection with the appointment of full-time office-holders and employees of a State or Territory as a Public Interest Advocate. Regulation 21 contemplates that State office holders may be declared as Public Interest Advocates and would enable arrangements to be entered into to give effect to the performance by State office holders of the Public Interest Advocate role.

Part 5—Application and transitional provisions

Division 1—Amendments made by the Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015

Regulation 22—Use of prescribed forms

121. Regulation 22 provides that agencies may continue to use the historic version of Forms 1, 2 and 6 for a period of 7 days after commencement. This facilitates the making of applications during the week following the commencement of the Regulations, which may have been prepared on the previous forms. Regulation 22 does not prevent agencies from using new Forms 1, 2 and 6 from the date of commencement.

Regulation 23—Repeal of this Division

122. Regulation 23 ensures that the application and transitional provisions relating to the use of Forms 1, 2 and 6 are repealed on the 8th day after commencement.

[Item 8] Schedule 3

123. This item substitutes the existing 'Schedule 3' heading with 'Schedule 3—Forms'.

[Item 9] Schedule 3—Forms 1, 2 and 6

124. This item substitutes existing Forms 1, 2 and 6 of the Principal Regulations with new Forms 1, 2 and 6. The amendment provides updated forms for telecommunications service and stored communication warrants to be used to obtain those warrants under sections 49 and 118 of the Principal Act respectively.

125. Existing Form 1 is the form prescribed for telecommunications service warrants. This authorises the interception of a telecommunications service used or likely to be used by the person of interest. The amendment ensures the Form is consistent with the Principal Act by ensuring that the form envisages the interception of a single service utilised by multiple people.

126. Existing Form 2 is the form prescribed for a service warrant authorising the interception of a telecommunications service used or likely to be used by a person likely to communicate with the person of interest. The amendment ensures that the Form is consistent with the Principal Act by ensuring that the form envisages the interception of a single service utilised by multiple people.

127. Existing Form 6 is the form prescribed for a stored communications warrant authorising access to any stored communication made or received by the person in respect

of whom the warrant is issued. The amendment ensures that the Form reflects changes to the class of agencies who may apply for stored communications warrants, which operate to reduce the number of agencies able to apply to stored communications warrants consistent with the Data Retention Act. The Data Retention Act amends the Principal Act to limit the range of agencies who may apply for stored communications warrants from the previous 'enforcement agencies' to the narrower category of 'criminal law enforcement agencies'.

[Item 10] Schedule 3—Form 7

128. This inserts a new Form 7 to provide a new form for journalist information warrants, supporting the requirement in section 180U of the Principal Act that a journalist information warrant must be in accordance with 'the prescribed form'.