

EXPLANATORY STATEMENT

Select Legislative Instrument 2017

Issued by the authority of the Attorney General

Telecommunications (Interception and Access) Act 1979

Telecommunications (Interception and Access) Regulations 2017

1. The *Telecommunications (Interception and Access) Act 1979* (Act) regulates access to telecommunications content and data. It provides the legal framework for intelligence and law-enforcement agencies to access information held by communications providers for the investigation of criminal offences and other activities that threaten safety and security. The Act prohibits the interception of telecommunications, except in specified circumstances. The Act outlines the issue of warrants for authorising the interception of telecommunications.
2. Section 300 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.
3. Section 180X of the Act provides that the Prime Minister shall declare, in writing, one or more persons to be Public Interest Advocates, with provision that the regulations may prescribe matters relating to the performance of the role of a Public Interest Advocate (subsection 180X(3)).
4. Regulations were made under the Act in 1987 as the *Telecommunications (Interception and Access) Regulations 1987*. Those regulations will sunset on 1 April 2017.
5. The *Telecommunications (Interception and Access) Regulations 2017* (the Regulations) will remake the *Telecommunications (Interception and Access) Regulations 1987* in substantially the same form, with minor modifications to ensure the regulations remain fit for purpose. The Regulations will update references to the Commonwealth Legal Services Directions.
6. The purpose of the Regulations is to prescribe the matters necessary for the effective operation of the Act.
7. The Regulations will:
 - support the legal framework under the Act;
 - prescribe the forms in relation to issuing warrants and authorisations;
 - prescribe roles relating to the performance of the role of a Public Interest Advocate (PIA).
8. The Regulations provide forms for a service warrant issued under section 46 of the Act, named person warrant issued under section 46A of the Act, warrant for entry on

premises under section 48 of the Act, stored communication warrants under section 116 of the Act and journalist information warrants under section 180T of the Act.

Service Warrants

9. A service warrant can provide the authorisation to intercept telecommunications to or from a service used or likely to be used by a person of interest. The warrant can further authorise the interception of telecommunications to or from a service used or likely to be used by a person who is not under investigation but is known to communicate with the person of interest in certain circumstances (B-Party warrant). The Regulations ensure that the form prescribed for service warrants envisages the interception of a single service utilised by multiple people.

Named person Warrants

10. A named person warrant can provide the authorisation to intercept telecommunications services used or likely to be used by a person of interest. The warrant can further authorise the interception of communications to or from any telecommunications devices used or likely to be used by a person of interest.

Warrant for entry on premises

11. A warrant for entry on premises can authorise entry on premises where an agency was also able to apply for a warrant under section 46 of the Act, which authorises interceptions of communications to or from a service.

Stored Communications Warrants

12. A stored communications warrant can authorise access to any stored communications made or received by the person in respect of whom the warrant is issued. The prescribed form under the Regulations reflects the limited range of agencies who may apply for stored communication warrants to the narrower category of ‘criminal law enforcement agencies’ set out in the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*.

Journalist Information Warrants

13. A journalist information warrant can authorise access to telecommunications data relating to a journalist, or their employer, for the purposes of identifying a journalist’s source. In order for a journalist information warrant to be provided, the Minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) must be satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.
14. The Regulations prescribe roles relating to the performance of the role of a PIA and matters that are necessary or convenient to be prescribed for carrying out or giving effect to the role of the PIA.
15. Details of the Regulations are set out in the Attachment.

16. The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.
17. In drafting the updated Regulations, the department's consultation process began in late July 2017. The department sought feedback on whether the Regulations may be improved or amended to enhance the operation of the Act.
18. The law enforcement agencies consulted were:
- the police force of every state and territory
 - the Australian Commission for Law Enforcement Integrity
 - the Australian Criminal Intelligence Commission
 - the Australian Federal Police
 - the Victorian Independent Broad-based Anti-corruption Commission
 - the Queensland Crime and Corruption Commission
 - the Western Australian Corruption and Crime Commission
 - the South Australian Independent Commissioner Against Corruption
 - the New South Wales Independent Commission Against Corruption
 - the New South Wales Law Enforcement Conduct Commission
 - the New South Wales Crime Commission
 - the Australian Securities and Investments Commission
 - the Australian Competition and Consumer Commission, and
 - the then Department of Immigration and Border Protection.
19. The following telecommunications providers were consulted: Telstra, Optus, Vodafone, TPG and the National Broadband Network.
20. The department received a small number of responses, all of which were to confirm law enforcement agencies or providers had no comments.
21. The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.
22. The Regulations will commence on 1 April 2018.

Authority: Section 300 of the *Telecommunications (Interception and Access) Act 1979*

Statement of Compatibility with Human Rights

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

Telecommunications (Interception and Access) Regulations 2017

23. This legislative instrument is 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

24. The *Telecommunications (Interception and Access) Regulations 2017* (Regulations) are made by the Governor-General under section 300 of the *Telecommunications (Interception and Access) Act 1979* (Act).
25. The Regulations remake the *Telecommunications (Interception and Access) Regulations 1987* (TIA Regulations) in their current form, with minor amendments. The Regulations preserve existing arrangements in the TIA Regulations but have been remade in accordance with current drafting practices.
26. The Act regulates access to telecommunications content and data. It provides the legal framework for intelligence and law-enforcement agencies to access information held by communications providers for the investigation of criminal offences and other activities that threaten safety and security. The TIA Regulations give effect to key provisions in the Act to support the legal framework of the Act by prescribing the forms in relation to issuing warrants and authorisations, including journalist information warrants (JIW), and prescribes roles relating to the performance of the role of a Public Interest Advocate (PIA). The TIA Regulations currently underpin the functions of law-enforcement and intelligence agencies and issuing authorities under the Act.
27. The TIA Regulations are scheduled to sunset in accordance with section 50 of the *Legislation Act 2003*. The Regulations remake the existing TIA Regulations. The Regulations will also make minor amendments to the extant version to update references to the Commonwealth Legal Services Directions.
28. The Regulations will retain existing arrangements for prescribing forms in relation to issuing warrants and authorisations, including JIW, and prescribe roles regarding PIAs.

Human rights implications

29. The Regulations engage the right to protection against arbitrary and unlawful interferences with privacy under article 17 and freedom of expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The right to protection against arbitrary and unlawful interferences with privacy

30. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks.
31. Interferences with privacy may be permissible where they are authorised by law and not arbitrary. In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable under the circumstances.
32. The United Nations Human Rights Committee (the HRC) has interpreted 'reasonableness' to mean that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.
33. The Regulations engage the right to privacy by prescribing the forms in relation to issuing warrants and authorisations, including journalist information warrants. These warrants and authorisations allow the interception of telecommunications, limiting the right to protection from arbitrary and unlawful interference with privacy under Article 17 of the ICCPR.
34. The limitation of the right to privacy under the prescribed warrants and authorisations regime are for the legitimate end of the protection of national security, public safety, addressing crime, and protecting the rights and freedoms of individuals.
35. Regulations 6 and 7 describe the listing of criminal organisations and confiscation and forfeiture laws. These regulations go to the legitimate end of addressing crime.
36. The journalist information warrant 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. This ensures that competing public interests have been considered and appropriately weighed.
37. Furthermore, the journalist information warrant regime requires that prior to issuing a warrant an issuing authority must have regard to any submissions of a Public Interest Advocate (PIA). The PIA represents the 'public interest' in this regime. The PIA will review the requests and applications made by ASIO and enforcement agencies for a JIW and will make submissions to the Minister (for a request by ASIO) and Part 4-1 issuing authorities (for a request by enforcement agencies) whether the warrant should be issued and whether any conditions or restrictions should be imposed on the warrant.
38. This process ensures that any interference with the privacy of any person or persons that may result from disclosing telecommunications data would be lawful, justifiable and proportionate.
39. The Regulations create the necessary safeguards that apply to the journalist information warrant regime through:

- a. prescribing that only senior members of the legal profession may be appointed as PIAs (Senior Counsel, Queen's Counsel, former Commonwealth judges, or former State or Territory superior court judges), ensuring that PIAs are persons of the highest integrity and impartiality with extensive experience in making public interest arguments
 - b. requiring that agencies provide a PIA with a copy of a proposed request or application for a JIW or notify a PIA prior to making an oral application
 - c. enabling PIAs to receive further information provided to the Minister or issuing authority by agencies further to the information contained in the request or application
 - d. enabling PIAs to prepare a new or updated submission based on any further information provided and
 - e. placing decisions about any exceptions from the above requirements with PIAs, Ministers or issuing authorities instead of with the agencies.
40. 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.

Freedom of expression

41. Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds. The right to freedom of expression carries special duties and responsibilities.
42. The right to freedom of expression may be subject to certain restrictions, as are provided for by law and are necessary for specified purposes including the protection of national security or public order (including law enforcement).
43. The Regulations do not limit the right to freedom of expression. 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.
44. 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.

45. 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. The Public Interest Advocate process further supports the right to freedom of expression by requiring the balance 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.

Conclusion

46. The measures in the Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

NOTES ON SECTIONS

Telecommunications (Interception and Access) Regulations 2017

Details of the proposed *Telecommunications (Interception and Access) Regulations 2017*

Part 1 - Preliminary

Regulation 1 – Name of Regulations

47. Regulation 1 provides that this Regulation is the *Telecommunications (Interception and Access) Regulations 2017*.

Regulation 2 – Commencement

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

Regulation 3 – Authority

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

Regulation 4 – Schedules

50. Regulation 4 provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Regulation 4 further provides that any other item in a Schedule to these Regulations has effect according to its terms.

Regulation 5 – Definitions

51. Regulation 5 defines ‘Act’ as the *Telecommunications (Interception and Access) Act 1979*.

Part 2 – General Matters

Regulation 6 – Criminal Organisations

52. Regulation 6 prescribes section 7 of the *Serious Crime Control Act* (NT) for the purposes of paragraph (b) of the definition of *criminal organisation* in the Act. A range of criminal offences relating to *criminal organisations* are *serious offences* within the meaning of the Act, for which interception agencies may apply for and obtain interception warrants under Part 2-5 of the Act.

Regulation 7 – Prescribed Acts for proceedings for confiscation or forfeiture or for pecuniary penalty

53. Regulation 7 prescribes the following acts for the purposes of paragraph 6K(c) of the Act:
- a. *Proceeds of Crime Act 2002*;

- b. *Confiscation of Proceeds of Crime Act 1989* (NSW);
- c. *Criminal Assets Recovery Act 1990* (NSW);
- d. *Confiscation Act 1997* (Vic);
- e. *Criminal Proceeds Confiscation Act 2002* (QLD);
- f. *Criminal Property Confiscation Act 2000* (WA);
- g. *Criminal Assets Confiscation Act 2005* (SA);
- h. *Crime (Confiscation of Profits) Act 1993* (Tas);
- i. *Confiscation of Criminal Assets Act 2003* (ACT);
- j. *Criminal Property Forfeiture Act* (NT).

Regulation 8 – Warrants authorising agencies to intercept telecommunications

54. Regulation 8 prescribes Form 1 to Form 5 in Schedule 1 for authorising agencies to intercept telecommunications for the purposes of subparagraph 49(1) of the Act. The effect of this regulation is to specify the forms for warrants issued under Part 2-5 of the Act, which authorise agencies to intercept telecommunications.

Regulation 9 – Stored Communications warrants

55. Regulation 9 prescribes Form 6 in Schedule 1 for the purposes of paragraph 118(1)(a) of the Act. The effect of this regulation is to specify the form for warrants issued under Part 3-3 of the Act, which authorise criminal law enforcement agencies to access stored communications.

Regulation 10 – Journalist Information warrants

56. Regulation 10 prescribes Form 7 in Schedule 1 for the purposes of subsection 180U(1) of the Act. The effect of this regulation is to specify the form for journalist information warrants issued to enforcement agencies under Part 4-1 of the Act.

Part 3 – Access to telecommunications Data

Division 1 – Journalist Information Warrants

Regulation 11 – Public Interest Advocate to be given proposed journalist information warrant request made by the Director-General of Security

57. Section 180J of the 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.
58. Subregulation 11(1) requires that, before requesting a journalist information warrant under section 180J of the Act, the Director-General must give a copy of the proposed request to a Public Interest Advocate.
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 Act for the Minister to have regard to under subparagraph 180L(2)(b)(v) of the Act.

60. Subregulation 11(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 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 18(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 11(1) will ensure that the Director-General will not be required, as a result of the operation of subregulation 11(2), to give a proposed request to an Advocate who is not cleared to review highly sensitive information.
62. Subregulation 11(2) provides that, if a copy of a proposed request is given to a Public Interest Advocate, as required under subregulation 11(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 11(1), subregulation 11(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 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 11 relies on the 'necessary and convenient' power in subsection 300(1)(b) of the Act. Regulation 11 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 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 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 11 is necessary to give effect to the Act.

Regulation 12 – Public Interest Advocate to be given proposed journalist information warrant applications made by an enforcement agency

65. Section 180Q of the Act provides that an enforcement agency may apply to a Part 4-1 issuing authority (within the meaning of the Act) for a journalist information warrant in relation to a particular person.
66. Subregulation 12(1) requires that, before making a written application for a journalist information warrant under section 180Q of the Act, the person must give a copy of the proposed application to a Public Interest Advocate.
67. Subregulation 12(2) requires that, before making an oral application for a journalist information warrant under section 180Q of the Act, the person must notify a Public Interest Advocate. Subsection 180Q(5) of the 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. Such a requirement is necessary to ensure that Public Interest Advocates are aware of each application, and are therefore:
 - a. *(in the case of written applications)* able to prepare submissions under paragraph 180X(2)(b) of the Act for the Part 4-1 issuing authority to have regard to under subparagraph 180T(2)(b)(v) of the Act; and
 - b. *(in the case of oral applications)* able to attend the application hearing to make oral submissions under paragraph 180X(2) of the Act for the Part 4-1 issuing authority to have regard to under subparagraph 180T(2)(b)(v) of the Act.
69. Subregulation 12(3) provides that, if a copy of a proposed application is given to a Public Interest Advocate, as required under subregulation 12(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 12(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 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 11, Regulation 12 relies on the ‘necessary and convenient’ power in subsection 300(1)(b) of the Act. Regulation 12 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 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 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 12 is necessary to give effect to the Act.

Regulation 13 – Public Interest Advocate to deal with proposed journalist information warrant requests and applications

72. Subregulation 13(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 13(2) mirrors subregulation 13(1) in relation to proposed oral applications for journalist information warrants by enforcement agencies.
74. Subregulation 13(3) addresses the situation where a Public Interest Advocate is given further information under subregulations 14(6) or 15(5). The effect of subregulation 13(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 14(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 14 – Public Interest Advocate to prepare submissions

76. Subregulation 14(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 14(2) requires the submission to include all facts and considerations the Public Interest Advocate considers are 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 14(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 14(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 14(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 14(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 14(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 14(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 14(7) requires that the Public Interest Advocate must prepare any new or updated submission in accordance with subregulation 14(1) and do so within a reasonable period, but no later than seven days after being given the further information or summary. Subregulation 14(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 14(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 14(1) or (7).

Regulation 15 – Public Interest Advocate’s attendance at hearing of oral application by an enforcement agency for a proposed journalist information warrant

84. Subregulation 15(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 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 15(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 15(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 15(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 15(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.
 89. Subregulation 15(5) deals with the preparation of a new or updated submission by a Public Interest Advocate who has confirmed his or her availability to attend an oral application when further information is given to the issuing authority and the Public Interest Advocate. Subregulation 15(5) requires a Public Interest Advocate to prepare a new submission, or update a previous submission on the application, taking into account the additional information or summary provided by the agency.

Regulation 16 – Further information, or a copy or summary of information, to be given to Public Interest Advocate

90. Sections 180K and 180R of the 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.
91. Where the Minister or issuing authority requires an agency to provide further information, Regulation 16 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 13, 14 and 15 contain related provisions that would apply where a Public Interest Advocate is given such information.
92. Where the Minister or issuing authority has been given further information in writing, paragraphs 16(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 16(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.
93. The power to require the Director-General or an enforcement agency to give further information, under sections 180K and 180R of the 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:

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

94. 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.

95. 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 16(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.

96. 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 17 – Public Interest Advocate to return proposed journalist information warrant requests and applications

97. Regulation 17 requires a Public Interest Advocate to return to the requesting agency any documents relating to requests or applications for journalist information warrants.
98. 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:
- a. subsection 32(3) of the *Australian Security Intelligence Organisation Act 1979* which requires the Minister to return requests for warrants to the Director-General;
 - b. 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
 - c. 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 18 – Eligibility for Appointment

99. Subregulation 18(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. a Senior Counsel or Queen’s Counsel who has a security clearance to a level that the Prime Minister considers appropriate;
 - b. 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
 - c. 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).
100. 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.
101. The reference to a ‘court that... was created by the Parliament under Chapter III of the Constitution’ is intended to include former courts.

102. Subregulation 18(2) provides that certain classes of person must not be declared as Public Interest Advocates. Most significantly, paragraph 18(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.
103. Subregulation 18(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).
104. Subregulation 18(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 19—Term of appointment

105. Regulation 19 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 20—Remuneration

106. Regulation 20 provides for the remuneration of Public Interest Advocates.
107. Subregulations 20(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.
108. Subregulation 20(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 2017*. 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.

109. 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 2017*. 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.
110. 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.
111. 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.
112. The incorporation of the *Legal Services Directions 2017* 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 21—Disclosure of interests to the Minister

113. Regulation 21 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 22—Conflict of interest

114. Subregulation 22(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 22 is to support the integrity of the role of Public Interest Advocate.
115. 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 22(2) requires a Public Interest Advocate to advise an applicant for a journalist information warrant that:
- a. *(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
 - b. *(in the case of a proposed oral application)* he or she is unable to attend the hearing of the application.

116. Queen's Counsel and Senior Counsel routinely manage conflicts of interest in accordance with well-established professional rules. Accordingly, Regulation 22 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 22 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 23—Resignation

117. Regulation 23 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 24—Termination of appointment

118. Subregulation 24(1) prescribes the circumstances in which the Prime Minister may revoke the declaration of a Public Interest Advocate.

119. Subregulation 24(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 18(1).

Regulation 25—Immunity from legal action

120. Regulation 25 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 26 – Arrangements with States and Territories

121. Regulation 26 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 26 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 4 – Transitional Matters

Regulation 27 – Things done under the Telecommunications (Interception and Access) Regulations 1987

122. Regulation 27 provides that if a thing was done for a particular purpose under the *Telecommunications (Interception and Access) Regulations 1987* as in force immediately before those regulations were repealed and the thing could be done for that purpose

under this instrument, the thing has effect for the purposes of this instrument as if it had been done under this instrument.

Schedule 1 – Forms of warrants

- 123. Forms 1 to Form 3 are the forms prescribed for telecommunications service warrants, including B-party and named person warrants. These Forms are consistent with the requirements under section 46 and 46A of the Act.
- 124. Form 4 is the Form prescribed for telecommunications devices, named person warrants. This Form is consistent with the requirements under section 46A of the Act.
- 125. Form 5 is the Form prescribed for warrants for entry on premises and interception of communications. This Form is consistent with the requirements under section 48 of the Act.
- 126. Form 6 is the Form prescribed for stored communication warrants. This Form is consistent with the requirements under section 116 of the Act.
- 127. Form 7 is the Form prescribed for journalist information warrants. This Form is consistent with the requirements under section 180T of the Act.

Schedule 2 – Repeals

- 128. This Schedule 2 of the Regulations repeals the whole of the instrument of the *Telecommunications (Interception and Access) Regulations 1987*.