

EXPLANATORY STATEMENT

Minute No: 10 of 2019—Minister for Home Affairs

Subject - *Telecommunications (Interception and Access) Act 1979*
Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019

The *Telecommunications (Interception and Access) Act 1979* (the Act) protects the privacy of, and regulates access to content of telecommunications and telecommunications 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 communications, except in specified circumstances. The Act outlines the issue of warrants for authorising the interception of communications.

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.

Subsection 49(1) of the Act provides that a warrant shall be in accordance with the prescribed form and shall be signed by the Judge or nominated Administrative Appeals Tribunal member who issues it.

The *Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019* (the Regulations) will amend the *Telecommunications (Interception and Access) Regulations 2017*. The Regulations prescribe the matters necessary for the effective operation of the Act as it relates to the interception of communications for the purposes of:

- a. the protection of the public from a terrorist act
- b. preventing the provision of support for, or the facilitation of, a terrorist act
- c. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country, or
- d. determining whether the control order, or any succeeding control order, has been, or is being, complied with.

In particular, the Regulations include amendments to prescribe the forms for control order warrants issued under subsection 46(4) and 46A(2A) of the Act and section 48 of the Act.

Telecommunications Service Control Order Warrant—subsection 46(4)

A telecommunications service control order warrant provides the authorisation to intercept communications to or from a telecommunications service used or likely to be used by a person subject to a control order under the *Criminal Code Act 1995* (the Criminal Code). 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).

Named Person Control Order Warrant—subsection 46A(2A)

A named person control order warrant can provide the authorisation to intercept communications from any telecommunications service used or likely to be used by a particular person subject to a control order under the Criminal Code. The warrant can further authorise the interception of communications to or from any telecommunications devices used or likely to be used by a person subject to a control order under the Criminal Code.

Control Order Warrant for Entry on Premises—section 48

A control order 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 interception of communications to or from a service.

Details of the Regulations are set out in the **Attachment A**.

A Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at **Attachment B**.

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations were drafted in consultation with the Australian Federal Police which support the changes. No other consultation was considered necessary as the amendments do not substantially change existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable.

The Office of Best Practice Regulation (OBPR) has assessed the impacts of the Regulations to be minor and determined that no Regulation Impact Statement is required. OBPR Reference number 25005.

The Regulations commence on the day after they are registered on the Federal Register of Legislation.

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

Details of the *Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019*

Part 1 – Preliminary

Section 1 – Name

This section provides that the title of this instrument is the *Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019*.

Section 2 – Commencement

This section provides that the whole of this instrument is to commence the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that this instrument is made under the *Telecommunications (Interception and Access) Act 1979*.

Section 4 - Schedules

This section states 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. Section 4 further provides that any other item in a Schedule to these Regulations has effect according to its terms.

Schedule 1 – Amendments

Telecommunications (Interception and Access) Regulations 2017

Item 1– Paragraphs 8(a) and (b)

This item amends paragraphs 8(a) and (b) to omit ‘section 46’ and substitute ‘subsection 46(1)’. The intention is to clarify that existing Form 1 and Form 2 in Schedule 1 to the Regulations each relate to a service warrant issued under section 46(1) of the Act.

Item 2 – After paragraph 8(b)

This item amends section 8 of the Regulations to prescribe Form 2A and 2B for authorising agencies to intercept telecommunications for the purposes of subsection 49(1) of the Act. The effect of this item is to specify the forms for warrants issued under subsection 46(4) of the Act to which either subparagraph 46(4)(d)(i) or 46(4)(d)(ii) of the Act applies, which authorises agencies to intercept telecommunications.

Item 3 - Paragraphs 8(c) and (d)

This item amends paragraphs 8(c) and (d) to omit 'section 46A' and substitute 'subsection 46A(1)'. The intention is to clarify that existing Form 3 and Form 4 in Schedule 1 to the Regulations each relate to a named service warrant issued under section 46A(1) of the Act.

Item 4 – Paragraph 8(e)

This item repeals existing paragraph 8(e) of the Regulations and substitutes new paragraphs (e), (f), (g) and (h). The new paragraphs are for the purpose of subsection 49(1) of the Act which relates to the prescribed form for a warrant.

This item prescribes the forms for warrants issued under subsection 46A(2A) of the Act to which either subparagraph 46A(2A)(e)(i) or 46A(2A)(e)(ii) of the Act applies, which authorises agencies to intercept communications.

This item also prescribes the form for warrants issued under section 48 of the Act to which subsection 46(4) of the Act applies, which authorises agencies to enter a specified premises in connection with the interception of telecommunications authorised under subsection 46(4) of the Act.

This item also clarifies that existing Form 5 in Schedule 1 to the Regulations is the prescribed form for warrants issued under section 48 of the Act in circumstances in which subsection 46(1) of the Act applies.

Item 5 – After Form 2 in Schedule 1

This item provides for the forms to be used for warrants issued under subsection 46(4) of the Act, which authorises agencies to intercept telecommunications.

Form 2A –Telecommunications service control order warrant

This form is to be used by an eligible judge or a nominated Administrative Appeals Tribunal (AAT) member within the meaning of the Act, acting under subsection 46(4) of the Act to which subparagraph 46(4)(d)(i) of the Act applies, to authorise the interceptions of communications made to or from a telecommunications service.

Subsection 49(1) of the Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the Regulations provides that a warrant issued by an issuing officer under subsection 46(4) of the Act shall be in accordance with Form 2A in Schedule 1 to the Regulations.

Subsection 46(4) of the Act sets out the circumstances in which a control order warrant agency may apply for a telecommunications service control order warrant for the purposes of:

- a. the protection of the public from a terrorist act
- b. preventing the provision of support for, or the facilitation of, a terrorist act
- c. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country, or
- d. determining whether the control order, or any succeeding control order, has been, or is being, complied with.

Form 2B –Telecommunications service control order warrant—B-party

This form is to be used by an eligible judge or nominated AAT member within the meaning of the Act, acting under subsection 46(4) of the Act to which subparagraph 46(4)(d)(ii) of the Act applies, to authorise the interception communications made to or from a telecommunications service.

Subsection 49(1) of the Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the Regulations provides that a warrant issued by an issuing officer under subsection 46(4) of the Act is to be in accordance with Form 2B in Schedule 1 to the Regulations.

Subsection 46(4) of the Act sets out the circumstances in which a control order warrant agency may apply for a telecommunications service control order warrant for the purposes of:

- a. the protection of the public from a terrorist act
- b. preventing the provision of support for, or the facilitation of, a terrorist act
- c. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country, or
- d. determining whether the control order, or any succeeding control order, has been, or is being, complied with.

Item 6 – After Form 4 in Schedule 1

This item provides for the forms to be used for warrants issued under subsection 46A(2A) of the Act, which authorise agencies to intercept telecommunications.

Form 4A – Named person control order warrant—telecommunications services

This form is to be used by an eligible judge or nominated AAT member within the meaning of the Act, acting under subsection 46A(2A) of the Act to which subparagraph 46A(2A)(e)(i) of the Act applies, to authorise interceptions of communications made to or from any telecommunications service that a named person is using, or is likely to use.

Subsection 49(1) of the Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the Regulations provides that a warrant issued by an issuing officer under subsection 46A(2A) of the Act shall be in accordance with Form 4A in Schedule 1 to the Regulations

Subsection 46A(2A) of the Act sets out the circumstances in which a control order warrant agency may apply for a named person control order warrant for the purposes of:

- a. the protection of the public from a terrorist act
- b. preventing the provision of support for, or the facilitation of, a terrorist act
- c. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country, or
- d. determining whether the control order, or any succeeding control order, has been, or is being, complied with.

Form 4B – Named person control order warrant—telecommunications devices

This form is to be used by an eligible judge or nominated AAT member within the meaning of the Act, acting under subsection 46A(2A) of the Act to which subparagraph 46A(2A)(e)(ii) of the Act applies, to authorise interceptions of communications made by means of the particular telecommunications device(s) that a named person is using, or is likely to use.

Subsection 49(1) of the Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the Regulations provides that a warrant issued by an issuing officer under subsection 46A(2A) of the Act shall be in accordance with Form 4B in Schedule 1 to the Regulations.

Subsection 46A(2A) of the Act sets out the circumstances in which a control order warrant agency may apply for a named person control order warrant for the purposes of:

- a. the protection of the public from a terrorist act
- b. preventing the provision of support for, or the facilitation of, a terrorist act
- c. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country, or
- d. determining whether the control order, or any succeeding control order, has been, or is being, complied with.

Item 7 – After Form 5 in Schedule 1

This item provides the form to be used for warrants issued under section 48 of the Act, which authorises agencies' entry on premises where an agency was also able to apply for a warrant under subsection 46(4) of the Act.

Form 5A – Control order warrant for entry on premises and interception of communications

This form is to be used by an eligible judge or nominated AAT member within the meaning of the Act, acting under section 48 of the Act, to authorise entry on premises where an agency was also able to apply for a warrant under subsection 46(4) of the Act, which authorises interceptions of communications to or from a service.

Subsection 49(1) of the Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the Regulations provides that a warrant issued by an issuing officer under section 48 of the Act in relation to subsection 46(4) shall be in accordance with Form 5A in Schedule 1.

Where applicable, section 48 of the Act sets out the circumstances in which a control order warrant agency may apply for a control order warrant for entry on premises and interception of communications.

Statement of Compatibility with Human Rights

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

Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019

1. 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

2. The *Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019* (the Regulations) are made by the Governor-General under section 300 of the *Telecommunications (Interception and Access) Act 1979* (Act).
3. The Regulations amend the *Telecommunications (Interception and Access) Regulations 2017* (TIA Regulations) to prescribe the matters necessary for the effective operation of the Act.
4. The Regulations preserve existing arrangements in the TIA Regulations, but have been amended to prescribe the forms for a telecommunications service control order warrant issued under section 46(4) of the Act, a named person control order warrant issued under section 46A(2A) of the Act and warrant for entry on premises, relating to subsection 46(4), under section 48 of the Act.
5. 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 public safety and national security. The 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 telecommunications service warrants and named person warrants. The TIA Regulations currently underpin the functions of law-enforcement and intelligence agencies and issuing authorities under the Act.
6. The Regulations will retain existing arrangements for prescribing forms in relation to issuing warrants and authorisations under sections 46, 46A and 48 of the Act.

Human rights implications

The Regulations engage the following rights:

Prohibition on Arbitrary or Unlawful Interference with Privacy

7. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that:
 - a. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 - b. Everyone has the right to the protection of the law against such interference or attacks.
8. Although the United Nations Human Rights Committee (UNHRC) has not defined ‘privacy’, the term is broadly interpreted as encompassing freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. 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.
9. The UNHCR 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’. Additionally, the term ‘arbitrary’ means that any imposition on privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The term ‘unlawful’ means that no interference can take place except as authorised under domestic law.
10. The purpose of this Regulation is to prescribe the forms of warrant issued under subsection 46(4) and 46A(2A) of the Act and section 48 of the Act. To the extent that personal information is contained in the forms, the right to protection from arbitrary and unlawful interference with privacy under Article 17 of the ICCPR may be engaged.
11. The limitation of the right to privacy by including personal information in the forms is for the legitimate purpose of protecting national security, public safety, addressing crime, and protecting the rights and freedoms of individuals. As control order warrants assist in the prevention of terrorist activity as well as for the purposes of monitoring a control order they clearly support this legitimate purpose.

12. This limitation is authorised by law, is not arbitrary, and is proportionate to the legitimate purposes because the personal information collected in the form is limited to the information necessary to identify the person who is the subject of the warrant and the eligible Judge or Administrative Appeals Tribunal (AAT) member issuing the warrant. The information includes a person's name or other known identifying information. The form is only used by an eligible Judge or nominated AAT member for the purposes of issuing a warrant under subsections 46(4) and 46A(2A) of the Act and section 48 of the Act. The Regulations give effect to these provisions of the Act by prescribing the relevant form for the control order warrants.

Conclusion

13. 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.

The Hon Peter Dutton MP, Minister for Home Affairs