

EXPLANATORY STATEMENT

Issued by the Attorney-General

Telecommunications (Interception and Access) Act 1979

*Telecommunications (Interception and Access) Amendment (Public Interest Advocates)
Regulations 2023*

The *Telecommunications (Interception and Access) Act 1979* (the Act) protects the privacy of Australians by prohibiting the interception of communications and access to stored communications, except under limited circumstances. These circumstances include a legal framework for security and law enforcement agencies to seek warrants to intercept and access communications, and authorise the disclosure of telecommunications data, for the investigation of criminal offences and threats to national security. 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.

Division 4C of Chapter 4 of the Act establishes the role of the Public Interest Advocate (PIA). PIAs are empowered to make submissions on applications for Journalist Information Warrants (JIWs). Under the Act, the Australian Security Intelligence Organisation (ASIO) and enforcement agencies must not authorise the disclosure of telecommunications data relating to a journalist or a journalist's employer for the purpose of identifying a journalist's confidential sources unless a JIW is in force in relation to the journalist or journalist's employer. A PIA may make submissions on matters relevant to a decision to issue, refuse or impose conditions or restrictions on a JIW. These submissions must be considered by an issuing authority when determining whether to issue a JIW. These submissions must be considered by a Part 4-1 issuing authority, defined under section 6DB of the Act (for enforcement agencies) or the Attorney-General (for ASIO) when determining whether to issue a JIW.

Section 180X of the Act provides that the Prime Minister shall declare, in writing, one or more persons to be PIAs, with provision that the Regulations may prescribe matters relating to the performance of the role of a PIA (subsection 180X(3)).

Subregulation 18(1) of the *Telecommunications (Interception and Access) Regulations 2017* (the Principal Regulations) prescribes the following qualifying criteria for appointment as a PIA:

- a. the person is a Queen's Counsel or Senior Counsel who has been cleared for security purposes to a level that the Prime Minister considers appropriate; or
- b. the person has served as a judge of:
 - i. the High Court; or

- ii. a court that is or was created by the Parliament under Chapter III of the Constitution; or
- iii. the Supreme Court of a State or Territory; or
- iv. the District Court (or equivalent) of a State or Territory;

but no longer holds a commission as a judge of a court listed in this paragraph.

The *Telecommunications (Interception and Access) Amendment (Public Interest Advocates) Regulations 2023* (the Regulations) amend the *Telecommunications (Interception and Access) Regulations 2017* (the Principal Regulations) to expand the qualifying criteria for appointment as a PIA, and exclude Part 4-1 issuing authorities from being declared a PIA.

The Attorney-General's Department (the department) manages the appointment process of PIAs under the Act in consultation with the Department of Prime Minister and Cabinet. The amendments to the Regulations are required to address the current small pool of potential PIA candidates despite anticipated increased demand from ASIO and enforcement agencies for the PIA role to consider applications for JIW. This demand is unlikely to be able to be met under the current eligibility requirements. The existing eligibility criteria for PIAs has also limited a balanced gender representation of PIA candidates, and subsequently, appointments. There are currently five PIAs appointed under section 180X of the Act – four males and one female.

The Regulations will expand the prescribed qualifying criteria under subregulation 18(1) of the Principal Regulations to include former judges of inferior courts, and barristers with at least 10 years' practising experience and experience in areas of the law that the Prime Minister considers relevant. This would address the insufficient numbers for potential PIA candidates and support improved gender balance. It has been developed to expand the criteria to capture additional classes of appropriately qualified senior members of the legal profession that hold greater gender diversity, such as barristers and former judges of inferior courts. This has been informed by knowledge and trends of gendered representation across different roles in the legal and judicial system.

The Regulations also exclude Part 4-1 issuing authorities as eligible candidates for appointment as a PIA. The role of a Part 4-1 issuing authority is to determine whether it is reasonably necessary to issue a JIW for the purpose for which it is sought, and whether the public interest in issuing it outweighs the public interest in maintaining the confidentiality of the relevant source. The JIW framework allows a PIA to make a submission to the issuing authority of the warrant to the propriety of the law enforcement agency's application.

The Act does not expressly provide that a person cannot be appointed to both roles (PIA and Part 4-1 issuing authority), and also does not contemplate that a person might be appointed to both roles. This raises risk of conflict between a person being appointed both to the role of PIA (in which they will provide submissions on relevant matters of public interest to be considered by the ultimate decision-maker's decision whether to issue a JIW) and Part 4-1 issuing authority (in which they will consider such submissions and decide on whether to

issue a warrant). The Regulations put beyond doubt any risk of a potential apprehend bias on a Part 4-1 decision-maker.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at **Attachment A**.

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

The Office of Impact Analysis (OIA) has been consulted in related to the amendments and has advised that a Regulation Impact Statement is not required (OIA Reference: OIA23-06037).

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

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 (Public Interest Advocates) Regulations 2023

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 Regulations

These Regulations will amend the *Telecommunications (Interception and Access) Regulations 2017* (the Principal Regulations) to expand the qualifying criteria for appointment as a Public Interest Advocate (PIA), and exclude Part 4-1 issuing authorities from being declared a PIA.

Division 4C of Chapter 4 of the *Telecommunications (Interception and Access) Act 1979* (the Act) establishes the role of the PIA. PIAs are empowered to make submissions on applications for Journalist Information Warrants (JIWs) by law enforcement agencies and the Australian Security Intelligence Organisation (ASIO) to determine whether it is reasonably necessary to issue the JIW for the purpose for which it is sought, and whether the public interest in issuing it outweighs the public interest in maintaining the confidentiality of the relevant source.

Section 180X of the Act provides that the Prime Minister shall declare, in writing, one or more persons to be PIAs, with provision that the Regulations may prescribe matters relating to the performance of the role of a PIA (subsection 180X(3)).

The Attorney-General's Department (the department) manages the appointment process of PIAs under the Act in consultation with the Department of Prime Minister and Cabinet. The existing eligibility criteria for PIAs has limited a balanced gender representation of PIA candidates, and subsequently, appointments. There are currently five PIAs appointed under section 180X of the Act – four males and one female.

The Regulations will expand the prescribed qualifying criteria under subregulation 18(1) of the Principal Regulations to include former judges of inferior courts, and barristers with at least 10 years' practising experience with experience in areas of the law as considered relevant by the Prime Minister. Experience in relevant areas of law may include practising experience in:

- Alternative Dispute Resolution;
- Criminal Law;
- Government;
- Inquests, Inquiries, Tribunals and Commissions;
- Public and Administrative Law; and/or
- Technology and Media Law.

This will address the insufficient numbers for potential PIA candidates, and support improved gender balance for potential PIA candidates.

The amendments would also address the current small pool of potential PIA candidates despite the anticipated increased demand from ASIO and enforcement agencies for the PIA role to consider applications for JIW.

It is the role of a Part 4-1 issuing authority to determine whether it is reasonably necessary to issue a JIW for the purpose for which it is sought, and whether the public interest in issuing it outweighs the public interest in maintaining the confidentiality of the relevant source. The Act does not expressly provide that a person cannot be appointed to both roles (PIA and Part 4-1 issuing authority), and also does not contemplate that a person might be appointed to both roles. There is a potential risk of conflict between a person being appointed both to the role of PIA (in which they will provide submissions on relevant matters of public interest to be considered by the ultimate decision-maker whether to issue a JIW) and Part 4-1 issuing authority (in which they will consider such submissions and decide on whether to issue a warrant).

The Regulations exclude Part 4-1 issuing authorities as eligible candidates for appointed as a PIA to put beyond doubt any risk of a potential apprehended bias on a Part 4-1 decision-maker.

Human rights implications

The Regulations engage the following human rights:

- the right to privacy – article 17 of the *International Covenant on Civil and Political Rights* (ICCPR)
- the right to freedom of expression – article 19 of the ICCPR

The right to privacy

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.

The protection against arbitrary or unlawful interference with privacy under Article 17 of the ICCPR can be permissibly limited in order to achieve a legitimate objective and where the limitations are unlawful and not arbitrary. The term ‘unlawful’ in Article 17 of the ICCPR means that no interference can take place except as authorised under domestic law.

Additionally, the term ‘arbitrary’ in Article 17(1) of the ICCPR means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ to mean that any limitation must be proportionate and necessary in the circumstances.¹

These Regulations promote the right to privacy. The JIW and PIA regimes seek to promote the protection of privacy by requiring law enforcement agencies and ASIO to apply for a warrant before accessing a journalist’s (or their employer’s) telecommunications data where a purpose is to identify a journalist’s (or their employer’s) source.

The Regulations promote the protection of privacy by expanding the number of PIAs across Australia, allowing for greater diversity across the cohort and ensures there is a sufficient number of PIAs to discharge the function.

The Regulations prescribe additional classes of senior members of the legal profession who may be appointed as PIAs (former judges of inferior courts, and barristers with at least 10 years’ practising experience and with experience in areas of the law the Prime Minister considers relevant), to provide for an increased pool of potential PIA candidates to make public interest arguments on JIW applications.

The Regulations prescribe the exclusion of Part 4-1 issuing authorities from being declared as PIAs. This puts beyond doubt any risk of potential apprehended bias on a Part 4-1 decision-maker given the potential risk of conflict between a person holding appointment as a PIA and Part 4-1 issuing authority.

The Regulations prescribe criteria for appointment of PIAs that ensure they are appropriately qualified and independent, and able to impartially advocate in the public interest.

To the extent that PIAs prepare submissions related to the issuing of, or conditions on, a JIW this positively engages the right to privacy by ensuring that any decision made to allow the disclosure of telecommunications data is reasonable, necessary and proportionate.

The right to freedom of expression

Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression, including the right ‘to seek, receive and impart information and ideas of all kinds

¹ *Toonen v Australia*, para 6.4, CCPR/C/50/D/488/1992, UN Human Rights Committee, 31 March 1994.

and regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.

Furthermore, Article 19(3) of the ICCPR provides that the exercise of the rights provided for in Article 19(2) carries with it special duties and responsibilities. It may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of national security or of public order.

The Regulations do not limit the right to freedom of expression. The JIW and PIA regimes seek to promote the protection of freedom of expression by requiring law enforcement agencies and ASIO to apply for a warrant before accessing a journalist’s (or their employer’s) telecommunications data where a purpose is to identify a journalist’s (or their employer’s) source. The Regulations support those protections by prescribing relevant criteria necessary to ensure there are enough PIAs to perform these functions.

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 Regulations promote freedom of expression and are compatible with Article 19 of the ICCPR as they strengthen the procedural safeguards that apply to agencies seeking access to information for the purpose of a identifying a journalist’s source. The enhanced PIA regime provides robust oversight of JIW applications which protects against access to source information where it is inconsistent with the assurances of confidentiality.

The Regulations support 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

The Regulations are compatible with human rights as, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

ATTACHMENT B

Details of the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates) Regulations 2023*

Section 1 – Name

This section provides that the title of the Regulations is the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates) Regulations 2023* (the proposed Regulations).

Section 2 – Commencement

This section provides that the commencement date for this instrument is the day after this instrument is registered.

Section 3 – Authority

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

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Telecommunications (Interception and Access) Regulations 2017

Item 1 – Paragraph 18(1)(a)

This item would omit “Queen’s” from paragraph 18(1)(a) of the *Telecommunications (Interception and Access) Regulations 2017* (the Principal Regulations) and substitute this with “King’s” to refer to King’s Counsel. This amendment would update the language of the paragraph in line with the change in the head of the monarchy.

Item 2 – After paragraph 18(1)(a)

This item would insert a new paragraph 18(1)(aa) into the Principal Regulations which provides that a person is eligible for appointment as a Public Interest Advocate (PIA) if the person is practising as a barrister of a federal court or a Supreme Court of a State or Territory and:

- (i) for at least 10 years has engaged in practice as a barrister; and
- (ii) has experience in areas of law that the Prime Minister considers relevant; and

- (iii) has been cleared for security purposes to a level that the Prime Minister considers appropriate.

For the purposes of subparagraph 18(1)(aa)(ii), experience in relevant areas of law may include practising experience in:

- Alternative Dispute Resolution;
- Criminal Law;
- Government;
- Inquests, Inquiries, Tribunals and Commissions;
- Public Administrative Law; and/or
- Technology and Media Law.

Given the Prime Minister's vested prerogative power, the Prime Minister would ultimately hold discretion as to which areas of law are considered relevant for the purposes of a barrister's legal practice experience.

This amendment would support improved gender representation of potential PIA candidates by expanding the eligibility criteria to capture additional classes of appropriately qualified senior members of the legal profession that hold greater gender diversity.

This amendment would also expand the eligibility criteria for appointment as a PIA to increase the potential pool of PIA candidates and to respond to the anticipated increased demand for the PIA role to consider applications for journalist information warrants (JIWs) by enforcement agencies and the Australian Security Intelligence Organisation. This would enhance the privacy safeguards to the JIW regime by having a greater number of appropriately qualified and independent advocates provide submissions as to whether the public interest in issuing a JIW to allow lawful disclosure of telecommunications data, outweighs the public interest in maintaining the confidentiality of the relevant source.

Item 3 – Subparagraph 18(1)(b)(iv)

This item would repeal and substitute paragraph 18(1)(b)(iv) of the Principal Regulations to provide that a person who has served as a judge of an inferior court of a State or Territory is eligible for appointment as a PIA.

This amendment would support improved gender representation of potential PIA candidates by expanding the eligibility criteria to capture additional classes of appropriately qualified senior members of the legal profession that hold greater gender diversity.

This amendment would also expand the eligibility criteria for appointment as a PIA to increase the potential pool of PIA candidates and to respond to the anticipated increased demand for the PIA role to consider applications for journalist information warrants (JIWs) by enforcement agencies and the Australian Security Intelligence Organisation. This would enhance the privacy safeguards to the JIW regime by having a greater number of appropriately qualified and independent advocates provide submissions as to whether the

public interest in issuing a JIW to allow lawful disclosure of telecommunications data, outweighs the public interest in maintaining the confidentiality of the relevant source.

Item 4 – At the end of subsection 18(2)

This item would insert a new paragraph 18(2)(g) into the Principal Regulations which provides that a Part 4-1 issuing authority may not be declared as a PIA.

The role of a Part 4-1 issuing authority is to determine whether it is reasonably necessary to issue a JIW for the purpose for which it is sought, and whether the public interest in issuing it outweighs the public interest in maintaining the confidentiality of the relevant source.

The Act does not expressly provide that a person cannot be appointed to both roles, and also does not contemplate that a person might be appointed to both roles. This raises potential risk of conflict between a person being appointed both to the role of PIA (in which they will provide submissions on relevant matters of public interest to be considered by the Part 4-1 decision-maker who will ultimately decide whether to issue a JIW) and of Part 4-1 issuing authority (in which they will consider such submissions and decide on whether to issue a warrant).

This amendment would exclude Part 4-1 issuing authorities as an eligible PIA candidate to put beyond doubt any risk of a potential apprehended bias on a Part 4-1 decision-maker.

Item 5 – Subparagraph 24(2)(c)(i)

This item would omit “Queen’s” from subparagraph 24(2)(c)(i) of the Principal Regulations and substitute this with “King’s” to refer to King’s Counsel. This amendment would update the language of the paragraph in line with the change in the head of the monarchy in 2023.

Item 6 – After paragraph 24(2)(c)

This item would insert a new paragraph 24(2)(ca) into the Principal Regulations which provides that the Prime Minister must revoke the declaration of a PIA if the PIA is a person mentioned in new paragraph 18(1)(aa) and either:

- (i) ceases to be a legal practitioner; or
- (ii) ceases to hold a security clearance to a level that the Prime Minister considers appropriate.

For the purposes of subparagraph 24(2)(ca)(i) of the Principal Regulations, a person ceases to be a legal practitioner if the person has been removed from the roll of barristers or has been banned from practising as a barrister.