

EXPLANATORY STATEMENT

National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017

Background

The *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (CTLA Act) made a range of amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act). To support the changes to the NSI Act contained in Schedules 15 and 16 of the CTLA Act, the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (the Principal Regulation) must be amended.

CTLA Act – Special advocates role

Part 1 of Schedule 15 of the CTLA Act amended the NSI Act to provide greater protection of national security information in control order proceedings (Division 104, *Criminal Code*). These amendments allow the court to make new orders under revised section 38J of the NSI Act so that the court can consider sensitive national security information in support of a control order application that is not shown to the subject of the control order proceeding (controlee) or their legal representative.

To enhance procedural fairness for the controlee, Part 2 of Schedule 15 of the CTLA Act amended the NSI Act to create the special advocate role. A special advocate is a security cleared lawyer, appointed by the court, who represents the interests of the controlee where the controlee has been excluded from hearing or seeing sensitive national security information. The special advocate may represent the interests of the controlee by making submissions to the court in parts of the proceedings where the controlee and their legal representative are not entitled to be present, by adducing evidence and cross-examining witnesses, and by making written submissions to the court. Section 38PI of the NSI Act provides for regulations that may determine matters relating to special advocates, including remuneration, conflicts of interest, and immunity.

CTLA Act – Application of Principal Regulation

The CTLA Act also amended the NSI Act in two respects relating to the application of the Principal Regulation. First, the CTLA Act amended the NSI Act to allow a court to make an order that is inconsistent with the Principal Regulation if the Attorney-General has applied for the order. Before this amendment, the court was precluded from making orders that were inconsistent with the Principal Regulation in any circumstances. Second, the CTLA Act amended the NSI Act to ensure the Principal Regulation continues to apply where an order is made under sections 22 or 38B of the NSI Act to the extent that the regulations relate to issues not included in the order. Section 22 and 38B orders allow the court to give effect to an agreement between the Attorney-General and the parties to a civil or federal criminal proceeding about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

Purpose

The *National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017* (the Regulations) outline the administrative arrangements for the special advocate regime, including:

- the requirements that must be satisfied in order to be appointed by the court as a special advocate, and
- matters in relation to remuneration, disclosure of interest, conflicts of interest, and immunity from legal action.

Furthermore, following the amendments to the NSI Act contained in the CTLA Act regarding the application of the Principal Regulation, the Regulations will amend the Principal Regulation to ensure that those changes to the primary legislation are reflected in the Principal Regulation.

Explanation and effect of provisions

Details of the Regulations are set out in [Attachment A](#).

Consultation

The Regulations have been subject to consultation with the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO).

Statement of Compatibility with Human Rights

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

National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017 (Cth)

The Regulations, a Disallowable Legislative Instrument, are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*.

Overview of the Regulations

The Regulations outline the administrative arrangements for the special advocate regime created in Part 2 of Schedule 15 of the CTLA Act. These administrative arrangements relate to the criteria for appointment as a special advocate, the remuneration of a special advocate, obligations relating to the disclosure of interest and conflicts of interest, and the circumstances in which the special advocate will have immunity from legal action.

The Regulations will also amend the Principal Regulation to ensure that changes made to the NSI Act by the CTLA Act regarding the protection and disclosure of national security information are reflected in the Principal Regulation.

Human Rights implications

The Regulations do not engage any human rights.

Conclusion

The Regulations do not engage any human rights.

ATTACHMENT A

Details of the *National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017 (Cth)*

Section 1 – Name

This section provides that the title of the Regulations is the *National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017* (the Regulations).

Section 2 – Commencement

This section provides for the Regulations to commence the day after the instrument is registered.

Section 3 – Authority

This section provides that the Regulations are made under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Item 1 – Subsection 5(1)

This item omits “(1)” as subsection 5(2) of the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (the Principal Regulation) is repealed.

Item 2 – after paragraph 5(1)(b)

This item inserts new paragraph 5(1)(ba) into the Principal Regulation. Section 5 of the Principal Regulation provides for the purpose of the Principal Regulation. New paragraph 5(1)(ba) provides that the Principal Regulation will prescribe, for the purposes of subsections 38PA(2) and 38PI(1) of the NSI Act, matters relating to special advocates.

Section 38PA of the NSI Act outlines the process by which special advocates will be appointed by a court to a control order proceeding under Division 104 of the *Criminal Code*. Subsection 38PA(2) provides that a court can only appoint a special advocate to the control order proceeding if:

- the person meets any requirements specified in the regulations, and
- the court has provided the parties to the proceedings (and their legal representatives), and the Attorney-General (and the Attorney-General’s legal representatives), the opportunity to make submissions to the court about who the court should appoint.

These Regulations assist the court by outlining the criteria that individuals must satisfy to be eligible as a special advocate.

Subsection 38PI(1) of the NSI Act provides that the regulations may determine matters relating to special advocates. These Regulations will determine a range of administrative matters relating to special advocates, including requirements for appointment of a special advocate, applicable rates of remuneration, requirements relating to disclosure and conflicts of interest, and the circumstances in which a special advocate will have immunity from legal action.

Item 3 – Subsection 5(1)(note)

This item omits “Note” and substitutes “Note 1” to enable the inclusion of a second note.

Item 4 – At the end of subsection 5(1)

This item includes a second note which provides that subsection 23(2) and 38C(2) of the NSI Act have the effect that the Principal Regulation does not apply in relation to certain matters to the extent that orders in force under section 22 or 38B of the NSI Act apply in relation to those matters. This amendment updates the Principal Regulation to reflect the amendments made to subsections 23(2) and 38C(2) of the NSI Act by the CTLA Act.

Item 5 – Subsection 5(2)

This item repeals subsection 5(2). This amendment repeals the subsection because it does not reflect the amendments made to subsections 23(2) and 38C(2) of the NSI Act by the CTLA Act. The inclusion of “Note 2” reflects these amendments.

Item 6 – Section 6 (at the end of the note)

This item inserts new paragraph (f) into the note at the end of section 6 of the Principal Regulation. Section 6 provides the definitions of key terms in the Principal Regulation. The note to this section clarifies that a number of terms in the Principal Regulation are not defined in the Regulation because they are defined in the NSI Act.

The definition of a “special advocate” of a party to a civil proceeding is set out in subsection 38PA(1) of the NSI Act. Subsection 38PA(1) provides the two criteria that must be satisfied in order for a court to appoint a special advocate. Firstly, under paragraph 38PA(1)(a) of the NSI Act, the proceeding must be a control order proceeding under Division 104 of the *Criminal Code* relating to an application to the issuing court to make a control order, to confirm a control order, or vary a control order.

Secondly, under paragraph 38PA(1)(b) of the NSI Act, the court must have made an order under subsection 38I(3A) to exclude the controlee (and their ordinary legal representative) from the hearing under subsection 38G(1) or 38H(6) of the NSI Act where the court will determine if and how sensitive national security information will be disclosed, or have made an order under subsections 38J(2), (3) or (4) which excludes the controlee (and their ordinary legal representative) from parts of the control order proceeding where sensitive national security

information is considered by the court. Where these orders have been made, a special advocate may be appointed to represent the interests of the controlee in those parts of the control order proceeding where the controlee (and their ordinary legal representative) has been excluded.

Item 7 – Section 6

This item amends section 6 of the Principal Regulation to insert the definition of key new terms relating to special advocates.

“Deputy Director-General of Security” means a person who holds, or is acting in, a position known as Deputy Director-General of Security.

“Director-General of Security” means the Director-General of Security holding office under the *Australian Security Intelligence Organisation Act 1979*.

An “eligible former judge” means a former judge of any of the following courts:

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

An “eligible legal practitioner” means a person who:

- is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory; and
- holds a practising certificate (however described); and
- has at least 5 years’ legal advocacy experience; and
- holds a Negative Vetting Level 2 security clearance.

An “eligible senior counsel” means a person who:

- is a Queen’s Counsel or Senior Counsel; and
- holds a Negative Vetting 2 security clearance.

“Negative Vetting Level 2 security clearance” means a security clearance that:

- is issued by the Australian Government Security Vetting Agency, or by another Commonwealth, State or Territory agency that is authorised or approved by the Commonwealth to issue security clearances, and
- permits ongoing access to information that has been assigned any of the following security classifications:
 - PROTECTED
 - CONFIDENTIAL
 - SECRET
 - TOP SECRET.

Special advocates will require a Negative Vetting Level 2 security clearance as their role may require them to access information classified up to TOP SECRET. The security classifications reflect the level of damage done to national interest, organisations or individuals of the unauthorised disclosure, or compromise of, particular information.

Relevantly, the four security classifications have all been capitalised. This reflects the correct approach to marking these classifications in documents.

Item 8 – Section 6 (definition of *security classification*)

This item omits the phrase “by the Commonwealth” from the definition of “security classification”. This amendment reflects the fact that other agencies, such as State and Territory agencies, may also assign protective markings to information to indicate the value of the information, and the minimum level of protection that the information must be afforded to protect it from compromise when it is being used, stored, transmitted, transferred or disposed of.

Item 9 – Section 6 (examples at the end of the definition of *security classification*)

This item is a consequential amendment arising from item 7. It ensures the capitalisation of the following security classifications: PROTECTED, CONFIDENTIAL, SECRET and TOP SECRET. This reflects the correct approach to marking these classifications.

Item 10 – Before section 8

This item inserts new section 7A into the Principal Regulation which provides for the circumstances in which Part 2 of the Principal Regulation does not apply. Part 2 of the Principal Regulation governs the appropriate protection of security classified documents and national security information.

The CTLA Act amended sections 19(1A), (1B), (3A) and (3B) of the NSI Act to enable the court to make orders as it considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information, even where those orders are inconsistent with the Principal Regulation, if the court is satisfied that it is in the interests of national security to make such orders and the Attorney-General or the Attorney-General’s representative applied for the order. There is no provision in the NSI Act or the Principal Regulation to clarify that in such circumstances, the court order takes precedence over the Principal Regulation. This potentially leaves a person bound to comply with both an order under section 19(1A) and (3A) and an inconsistent requirement in the Principal Regulation.

This item rectifies this. New section 7A provides that Part 2 of the Principal Regulation does not apply:

- to the extent that the protection, or storage, or handling, or destruction of particular national security information is otherwise dealt with in orders made under subsection 19(1A) or 19(3A) of the NSI Act, and

- provided the orders were made on an application by the Attorney-General or a representative of the Attorney-General.

Item 11 – Sections 10, 11, 12 and 13

This item replaces the references to “Top Secret” in sections 10, 11, 12 and 13 of the Principal Regulation, with the capitalised reference to “TOP SECRET”. This is a consequential amendment arising from item 7.

Item 12 – Part 3

This item inserts new Part 3A into the Principal Regulation. New Part 3A contains the principal amendments that relate to the administrative arrangements underlying the special advocate role.

Appointment requirements

New section 20A relates to the appointment requirements for special advocates. These are the requirements that a court must be satisfied of before appointing a person to be a special advocate under section 38PA of the NSI Act. New section 20A outlines four criteria that must be satisfied before an individual can be appointed by a court as a special advocate in a control order proceeding.

Firstly, new paragraph 20A(a) requires that an individual must be:

- an eligible former judge; or
- an eligible senior counsel; or
- an eligible legal practitioner.

Eligible former judges and eligible senior counsel are generally recognised as being persons of the highest integrity and impartiality. These individuals are also likely to have substantial experience in conducting court cases, and accordingly, will be familiar with rules of evidence and procedure, and are likely to have extensive experience in reviewing complex materials (such as affidavits), examining witnesses, and making written and oral submissions to the court.

A special advocate can also be an “eligible legal practitioner”. The eligible legal practitioner must have at least 5 years of legal advocacy experience to ensure that they have sufficient court experience to be able to perform the role of a special advocate effectively. This additional category of individuals who may be eligible to be special advocates ensures that the pool of individuals who can be appointed as special advocates is not unnecessarily limited.

Eligible former judges, eligible senior counsel and eligible legal practitioners are individuals who are likely to have the experience and skills required to perform the complex role of a special advocate effectively. The special advocate role is complex because a special advocate does not have an ordinary lawyer-client relationship with the controlee. This is because there

are restrictions on the extent to which a special advocate can represent the interests of a controlee. Examples of restrictions that make the role of the special advocate unique include:

- once the special advocate has seen the sensitive national security information that has been withheld from the controlee (and their legal representative), communication from the special advocate to the controlee is restricted, and subject to the authorisation of the court, and
- the special advocate cannot disclose the sensitive national security information to the controlee.

These restrictions mean that a special advocate must be experienced and skilful at representing the interests of the controlee, while ensuring there is no disclosure of sensitive national security information.

Where possible, it may be appropriate to appoint eligible former judges, eligible senior counsel, and eligible legal practitioners who have experience in national security proceedings.

Secondly, new paragraph 20A(b) provides that the person must have received appropriate training in accessing, storing, handling and destroying security classified documents and national security information. Such training is important because the information that will be provided to these individuals may include documents classified up to TOP SECRET and whose inadvertent disclosure will likely prejudice national security. Examples of such training include security awareness training, which encompasses understanding a clearance holder's rights and obligations, and the appropriate processes for creating, handling, removing, copying, storing and destroying classified information. Training will be conducted by relevant government departments and agencies, such as the Attorney-General's Department.

Thirdly, new paragraph 20A(c) provides that certain classes of people are not eligible to be appointed as special advocates. The classes of individuals listed in subparagraphs (i)-(iv) are individuals whose existing roles may create a conflict of interest with undertaking the role of a special advocate in control order proceedings.

The categories of individuals excluded from being a special advocate in a control order proceeding are not exhaustive. Paragraph 38PA(3)(b) of the NSI Act provides that the court may appoint another special advocate to the one requested by the controlee where the appointment of the nominated special advocate would result in the person having an actual or potential conflict of interest.

New paragraph 20A(c) does not preclude the eligibility of individuals 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 eligible to be a special advocate would limit the range of individuals eligible to be appointed. These

individuals are also likely to have extensive experience in appropriately managing real or apparent conflicts of interest.

Fourthly, new paragraph 20A(d) provides that the Attorney-General must be satisfied that the person is suitable for appointment because of the person's qualifications, training or experience. In determining whether the Attorney-General is satisfied, he or she may have regard to whether the person has demonstrated sound security practices, and whether the individual has previously undertaken court work relating to national security matters. It is appropriate that the Attorney-General, as the Minister responsible for the protection of national security information under the NSI Act, should be satisfied that the person with whom that information is shared has the experience and reliability to properly safeguard this information.

Remuneration of special advocates

New section 20B provides that a special advocate may charge the Commonwealth for the time spent in the performance of their functions. This can include, but is not limited to, time spent:

- reviewing documents associated with the control order proceeding
- preparing written submissions to the court, and
- appearing before the court.

The rate of remuneration is determined in accordance with Appendix D of the *Legal Services Directions 2017* (the Directions) as in force from time to time. The Attorney-General may approve a higher rate than that set out in the Directions.

Subsection 20B(1) provides that an eligible former judge or eligible senior counsel may charge the Commonwealth a daily rate equivalent to the maximum daily rate at which senior counsel may be engaged, without the approval of the Attorney-General in accordance with Appendix D of the Directions. Subparagraph 20B(1)(a)(ii) provides that the Attorney-General may approve a higher daily rate. Alternatively, the former eligible judge or eligible senior counsel may charge the Commonwealth an hourly rate of one-sixth of the maximum daily rate mentioned in paragraph 20B(1)(a), up to a maximum of 6 hours per day. Subparagraph 20B(1)(b)(ii) provides that the Attorney-General may approve a higher hourly rate.

Subsection 20B(2) provides that an eligible legal practitioner may charge the Commonwealth a daily rate equivalent to the maximum daily rate at which a junior counsel may be engaged, without the approval of the Attorney-General in accordance with Appendix D of the Directions. Subparagraph 20B(2)(a)(ii) provides that the Attorney-General may approve a higher daily rate. Alternatively, the eligible legal practitioner may charge the Commonwealth an hourly rate of one-sixth of the maximum daily rate mentioned in paragraph 20B(2)(a), up to a maximum of 6 hours per day. Subparagraph 20B(2)(b)(ii) provides that the Attorney-General may approve a higher hourly rate. The remuneration of an eligible legal practitioner is lower than that of an eligible former judge or eligible senior counsel. This

reflects the fact that eligible legal practitioners may have less experience in comparison to an eligible former judge or eligible senior counsel.

Special advocates are not counsel engaged on behalf of the Commonwealth or Commonwealth agencies, and so are not directly covered by the Directions. However, the Directions offer an established framework for the Commonwealth's engagement of legal professionals. In the context of the role of a special advocate, the Directions provide an appropriate benchmark for remuneration, and ensures that the remuneration of special advocates keeps pace with any changes to remuneration of Commonwealth counsel as prescribed under the Directions from time to time.

The setting of fixed daily and hourly rates is appropriate for special advocates, who are senior members of the legal profession, or individuals with strong advocacy experience. These individuals will be working on an infrequent and ad hoc basis, and potentially on short notice. The role of the special advocate is also complex. Accordingly, it is appropriate that special advocates are remunerated at a rate commensurate with the appointment of senior members or experienced members of the legal profession.

Importantly, the Regulations also provide flexibility, allowing the Attorney-General to approve a higher daily or hourly rate of remuneration than the maximum stipulated in the Directions where appropriate. In considering whether to approve a higher daily or hourly rate of remuneration, the Attorney-General may have regard to a range of matters, including the expertise or skill of the relevant counsel, the availability of counsel generally to appear in the control order proceeding, and the importance of the control order proceeding, and the probable total cost of counsel's fees in the matter.

Disclosure of interests to the court

New section 20C requires a special advocate to give the court that appointed them written notice of all interests, pecuniary or otherwise, that the special advocate has or acquires and that conflict or could conflict with the proper performance of his or her functions, or the exercise of his or her powers, as a special advocate.

The requirement to disclose relevant interests to the court is an ongoing requirement. If, during the course of the control order proceeding, the special advocate acquires interests that conflict or could conflict with the performance of the special advocate's function, or the exercise of his or her powers, the special advocate must notify the court.

Conflicts of interest

New section 20D requires that a special advocate must take reasonable steps to avoid any real or apparent conflict of interest in connection with the proper performance of his or her functions, or the exercise of his or her powers, as a special advocate during the control order proceeding. Should the special advocate believe that he or she has a real or apparent conflict of interest in relation to the control order proceeding, the special advocate must notify the court of this conflict. The purpose of new section 20D is to support the integrity of the role of a special advocate.

Immunity from legal action

New section 20E provides that no action, suit or proceeding may be brought against a special advocate in relation to anything done, or omitted to be done, in good faith by the special advocate in the performance (or purported performance) of their function as a special advocate, or in the exercise (or purported exercise) of their powers as a special advocate.