

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Criminal Code Act 1995, Telecommunications (Interception and Access) Act 1979

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021

The purpose of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021* (Amending Regulations) is to amend the *Criminal Code Regulations 2019* (Code Regulations) and the *Telecommunications (Interception and Access) Regulations 2017* (TIA Regulations) to support the effective operationalisation of the Commonwealth Extended Supervision Order (ESO) scheme.

The ESO scheme is provided for in the High Risk Terrorist Offenders (HRTO) regime in Part 5.3 of the *Criminal Code Act 1995* (Code). The ESO scheme was established by the amendments made by the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (the ESO Act).

The ESO Act was passed by the Parliament in 2021 and amended the Code, the *Administrative Decisions (Judicial Review) Act 1977*, the *Australian Security Intelligence Organisation Act 1979*, the *Crimes Act 1914* (Crimes Act), the *National Security Information (Criminal and Civil Proceedings) Act 2004*, the *Surveillance Devices Act 2004* (SD Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act). Relevant to the Amending Regulations, a principal purpose of the amendments in the ESO Act was to introduce the ESO scheme, to manage the unacceptable risk posed by convicted terrorist offenders to the community upon their release from custody.

The Amending Regulations amend the:

- Code Regulations, to facilitate information sharing between the Australian Federal Police Minister (AFP Minister) and a relevant expert for the purposes of Division 105A of the Code (post-sentence orders); and
- TIA Regulations, consequential to the amendments made by the ESO Act to the TIA Act, to amend existing forms for warrants and prescribe new forms for warrants authorising agencies to intercept telecommunications, for the purposes of subsection 49(1) of the TIA Act.

Legislative authority

The Code codifies the general principles of criminal responsibility under laws of the Commonwealth and contains all the general principles of criminal responsibility that apply to any offence. Section 5 of the Code provides that the Governor-General may make regulations prescribing matters required or permitted by the Code to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Code

The amendments to the Code Regulations made by the Amending Regulations are being made under Section 5 of the Code, to facilitate the sharing of information between the AFP Minister and relevant experts, for the purposes of 105A.19(1) and (3) of the Code.

The TIA Act protects the privacy of, and regulates access to, the content of telecommunications and telecommunications data. Section 300 of the TIA Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The Amending Regulations amend the TIA Regulations, under section 300 of the TIA Act, to ensure that the forms and content of warrants are consistent and give effect to the relevant provisions in the TIA Act (pursuant to section 49 of the TIA Act).

Purpose

The purpose of the Amending Regulations is to support the effective operationalisation of the ESO scheme, by ensuring that:

- relevant information may be shared between the AFP Minister and a relevant expert engaged to assess the risk posed by a terrorist offender, which will ensure both parties are fully informed to carry out their respective functions and responsibilities in connection with Division 105A of the Criminal Code, and
- Part 5.3 order warrants, issued under the TIA Act, are issued by issuing authorities in a consistent form containing the requisite information to establish the scope of the warrant.

Each of these Parts is described under separate headings below. Further specific detail of the amendments made by the Amending Regulations is at [Attachment A](#).

Code Regulation amendments

The HRTO regime is established in Part 5.3 of the Code and comprises Division 105A, which provides for post-sentence orders. Within this Division, subsections 105A.19(1) and (3) of the Code provide for the sharing (requesting and disclosing) of information between the AFP Minister and persons prescribed in section 10 of the Regulations (for the purposes of those subsections of the Code).

The Amending Regulations amend section 10 of the Code Regulations to add the following prescribed persons:

- a person who is a relevant expert and who is:
 - (i) appointed by the AFP Minister, under section 105A.18D of the Code; or
 - (ii) otherwise engaged, by the AFP Minister, or a person on behalf of the AFP Minister,to assess the risk of a terrorist offender committing a serious Part 5.3 offence (all within the meaning of Division 105A of the Criminal Code) for the purposes of that

Division (whether under section 105A.18D of the Code or otherwise, and whether or not an application for a post-sentence order has been made).

This amendment will allow the AFP Minister to request information from, and disclose information to, a relevant expert who is engaged by the AFP Minister (or a person on behalf of the AFP Minister), for the purposes of conducting a risk assessment on a terrorist offender.

This amendment ensures that the AFP Minister is able to adequately brief a relevant expert and ensure the expert's assessment of the risk posed by a convicted terrorist offender is as informed as possible. This is important, as the assessment may be considered by the Minister in determining whether to make an application to a court for a post-sentence order.

Consequently, this assessment may also be considered by the court under paragraphs 105A.6B(1)(b) and 105A.6B(1)(c) of the Code in determining whether to make an order under Division 105A of the Code.

TIA Regulation amendments

The amendments made by the ESO Act to the TIA Act expand the use of control order warrants obtained under the Act to include extended supervision orders and interim supervision orders. The ESO Act also amended the TIA Act to incorporate control orders and extended supervision orders under a single defined term, being a "Part 5.3 supervisory order". The Amending Regulations make consequential amendments to the TIA Regulations to incorporate this new term where relevant, and ensure its operation.

Subsection 49(1) of the TIA 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 (AAT) member who issues it.

The Amending Regulations amend the TIA Regulations to extend the application of telecommunications service warrant forms and telecommunications named person warrant forms, currently available in relation to a control order, to also be available in relation to post-sentence orders.

These amendments are consequential to the amendments made by the ESO Act, and ensure that the relevant forms are consistent with the primary legislation, thereby enabling them to be used by an eligible Judge or a nominated AAT member.

The Amending Regulations amend the TIA Regulations to insert the following Forms of warrants. Some of these forms are being updated and some are new forms:

- Form 2A: This form is updated and gives effect to section 46 of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from the telecommunications service with respect to an individual who is subject to a Part 5.3 supervisory order (including an order which is in force due to the operation of section 6T of the TIA Act);
- Form 2B: This form is updated and gives effect to section 46 of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from the telecommunications service where a Part 5.3 supervisory order is in force in relation to another person (including an order which is in force due to the operation of section 6T of the TIA Act), and the particular person is likely to communicate with the other person using the service;

- Form 2C: This new form gives effect to section 46 of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from the telecommunications service with respect to an individual who may be subject to a post-sentence order;
- Form 4A: This form is updated and gives effect to section 46A of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from telecommunications services that a person who is subject to a Part 5.3 supervisory order (including an order which is in force due to the operation of section 6T of the TIA Act) is using or is likely to use;
- Form 4B: This form is updated and gives effect to section 46A of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from telecommunications devices that a person who is subject to a Part 5.3 supervisory order (including an order which is in force due to the operation of section 6T of the TIA Act) is using or is likely to use;
- Form 4C: This new form gives effect to section 46A of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from telecommunications services that a person who may be subject to a post-sentence order is using or is likely to use;
- Form 4D: This new form gives effect to section 46A of the TIA Act by providing, as specified by the warrant, the authority for the interception of communications made to or from telecommunications devices that a person who may be subject to a post-sentence order is using or is likely to use;
- Form 5A: This form is updated and gives effect to section 48 of the TIA Act by providing, as specified by the warrant, the authority for entry onto the premises specified by the warrant in order to install, maintain, use or recover equipment or a line used in the interception of communications being made to or from the telecommunications service specified by the warrant, and to intercept communications by the use of that equipment or line, with respect to an individual who is subject to a Part 5.3 supervisory order (including an order which is in force due to the operation of section 6T of the TIA Act); and
- Form 5B: This new form gives effect to section 48 of the TIA Act by providing, as specified by the warrant, the authority for entry onto the premises specified by the warrant in order to install, maintain, use or recover equipment or a line used in the interception of communications being made to or from the telecommunications service specified by the warrant, and to intercept communications by the use of that equipment or line, with respect to an individual who may be subject to a post-sentence order.

Consultation

The Attorney-General's Department and the Australian Federal Police have been closely consulted on the Amending Regulations. Further consultation was not considered necessary due to the nature of the consultation that had already taken place throughout the development and passage of the ESO Act.

Regulatory impact statement

The Office of Best Practice Regulation (OBPR) was consulted during the drafting of the Amending Regulations. OBPR advised that the Amending Regulations were likely to have no

regulatory impacts and zero regulatory costs, and a regulatory impact statement was not required (OBPR ID: 43323).

Status and commencement

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

The Amending Regulations are compatible with human rights and freedoms for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The statement of compatibility with human rights is included at Attachment B.

The Amending Regulations commence the later of: (a) the start of the day after the Amending Regulations are registered; and (b) the commencement of Schedule 1 to the ESO Act. However, the Amending Regulations do not commence at all if Schedule 1 to the ESO Act does not commence.

Details on provisions

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021

Section 1 – Name

Section 1 provides that the name of the Disallowable Legislative Instrument is the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021* (Amending Regulations).

Section 2 – Commencement

Section 2 provides that the Amending Regulations commence on the later of:

- the start of the day after this instrument is registered; and
- the commencement of Schedule 1 to the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (ESO Act).

However, the Amending Regulations do not commence at all if Schedule 1 to the ESO Act does not commence.

Section 3 – Authority

Section 3 provides that the Amending Regulations are made under the *Criminal Code Act 1995* (the Code) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

Section 4 – Schedules

Section 4 provides that each instrument specified in a schedule to this instrument is amended or repealed as set out in this instrument and any other item in a schedule to this instrument has effect according to its terms. There is one Schedule to the Amending Regulations, which makes amendments to the *Criminal Code Regulations 2019* (Code Regulations) and the *Telecommunications (Interception and Access) Regulations 2017* (TIA Regulations).

Schedule 1—Amendments

Criminal Code Regulations 2019

The Amending Regulations amend section 10 of the Code Regulations to prescribe, for the purposes of subsections 105A.19(1) and (3) of the Code, a person who is a relevant expert appointed or engaged by the AFP Minister or a person on behalf of the AFP Minister.

Clause 1 – Section 10 (at the end of section 10, after (i))

Clause 1 adds paragraph (j) to section 10 of the Code Regulations to prescribe a person who is a *relevant expert* (as defined in Division 105A of the Code) and who is either:

- appointed by the AFP Minister, under section 105A.18D of the Code; or
- otherwise engaged, by the AFP Minister, or a person on behalf of the AFP Minister

to assess the risk of a *terrorist offender* committing a *serious Part 5.3 offence* (both terms as defined in Division 105A of the Code), for the purposes of that Division, whether or not an application for a post-sentence order has been made.

Subsection 105A.19(1) of the Code provides that the AFP Minister may request information from a person prescribed by the Code Regulations, for the purposes of that subsection, to give the AFP Minister information the AFP Minister reasonably believes to be relevant to the administration or execution of Division 105A of the Code (relating to post-sentence orders). Further, subsection 105A.19(3) of the Code provides that the AFP Minister may disclose information to a person prescribed in the Code Regulations, if the requirements in paragraphs 105A.19(3)(a) to (c) are met.

Subsection 105A.19(2A) of the Code provides that subsection 105A.19(1) of the Code applies despite any other law of the Commonwealth, a State or Territory (whether unwritten or written). Subsection 105A.19(4) of the Code provides that subsection 105A.19(3) of the Code applies despite any other law of the Commonwealth, a State or Territory (whether unwritten or written).

Section 105A.20 of the Code provides that the AFP Minister may, in writing, delegate the powers or functions under section 105A.19 of the Code to the Secretary of the Department administered by the AFP Minister or to any APS employee in that Department who performs duties in connection with the administration or execution of Division 105A of the Code.

The intention of this amendment is to allow the AFP Minister to request information from, and disclose information to, a relevant expert who is engaged by the AFP Minister (or a person on behalf of the AFP Minister), for the purposes of conducting a risk assessment on a terrorist offender.

This amendment is to ensure that the AFP Minister is able to adequately brief a relevant expert and ensure the expert's assessment of the risk posed by a convicted terrorist offender is as informed as possible. This is important as the assessment may be considered by the Minister in deciding whether to make an application to a court for a post-sentence order. Consequently, this assessment may also be considered by the court under paragraphs 105A.6B(1)(b) and 105A.6B(1)(c) of the Code in determining whether to make an order under Division 105A of the Code.

Telecommunications (Interception and Access) Regulations 2017

Clause 2 – Paragraphs 8(ba) and (bb)

Clause 2 omits the term “control order” from paragraphs 8(ba) and (bb). This clause is consequential to the amendments made by the ESO Act, which inserted the definition “Part 5.3 supervisory order” into subsection 5(1) of the TIA Act. “Part 5.3 supervisory order” is defined as meaning:

- a control order; or
- an extended supervision order or interim supervision order.

The intention of this amendment is to clarify that the prescribed forms under paragraphs 8(ba) and (bb) of the TIA Regulations are for “Part 5.3 supervisory orders” and not only control orders.

Clause 3 – After paragraph 8(bb)

Clause 3 inserts into section 8 of the TIA Regulations new paragraph 8(bc), which provides that, for the purposes of subsection 49(1) of the TIA Act, a new form is prescribed for a warrant issued under subsection 46(7) of the Act, which is Form 2C in Schedule 1 to the TIA Regulations. See Clause 7 for more information on Form 2C.

Clause 4 – Paragraphs 8(e) and (f)

Clause 4 omits the term “control order” from paragraphs 8(e) and (f) of the TIA Regulations. This clause is consequential to the amendments made by the ESO Act, which inserted the definition “Part 5.3 supervisory order” into subsection 5(1) of the TIA Act. “Part 5.3 supervisory order” is defined as meaning:

- a control order; or
- an extended supervision order or interim supervision order.

The intention of this amendment is to clarify that the prescribed forms under 8(e) and (f) of the TIA Regulations are for “Part 5.3 supervisory orders” and not only control orders.

Clause 5 – After paragraph 8(f)

Clause 5 inserts paragraphs 8(fa) and (fb) into section 8 of the TIA Regulations. This amendment prescribes two new forms for authorising agencies to intercept telecommunications for the purposes of subsection 49(1) of the TIA Act.

The two new forms are:

- Form 4C in Schedule 1 (paragraph 8(fa) of section 8 of the TIA Regulations); and
- Form 4D in Schedule 1 (paragraph 8(fb) of section 8 of the TIA Regulations).

The effect of this amendment is to specify the forms for warrants issued under subsection 46(2C) of the TIA Act, to which either subparagraph 46(2C)(h)(i) or 46(2C)(h)(ii) of the TIA Act relate. See Clause 8 for more information on Forms 4C and 4D.

Clause 6 – At the end of Section 8

Clause 6 inserts paragraph 8(i) into section 8 of the TIA Regulations. This amendment prescribes a new form for authorising agencies to intercept telecommunications for the purposes of subsection 49(1) of the TIA Act. The new form is Form 5B in Schedule 1 to the TIA Regulations.

The effect of this amendment is to specify the form of warrant issued under subsection 46(7) of the TIA Act. See Clause 9 for more information on Form 5B.

Clause 7 – Forms 2A to 2C

Clause 7 of the Amending Regulations repeals existing Forms 2A and 2B from the TIA Regulations and substitutes new Forms 2A, 2B and 2C. The new Forms 2A and 2B include amendments consequential to the amendments made by the ESO Act. Specifically, to include new terms, such as “Part 5.3 supervisory order” and “Part 5.3 object”, which were inserted as definitions into subsection 5(1) of the TIA Act by the amendments made by the ESO Act.

Clause 7 of the Amending Regulations prescribes a new Form 2C. The new Form 2C is consequential to amendments made by the ESO Act to ensure law enforcement have the authority to intercept communications that will provide contemporary evidence to assist in understanding an offender’s level of risk, which will inform the decision of whether or not to apply for a post-sentence order in relation to that offender.

Form 2A – Telecommunications service warrant for Part 5.3 supervisory order

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under subsection 46(4) of that Act to which subparagraph 46(4)(d)(i) of the Act applies, to authorise the interception communications made to or from a telecommunications service as specified by the warrant with respect to an individual who is subject to a Part 5.3 supervisory order (within the meaning of section 6T of the Act).

Subsection 49(1) of the TIA 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 authority under subsection 46(4) of the TIA Act shall be in accordance with Form 2B in Schedule 1 to the Regulations.

Subsection 46(4) of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a named person Part 5.3 warrant. Paragraph 46(4)(e) of the TIA Act provides:

“(e) information that would be likely to be obtained by intercepting under a warrant communications made to or from the service would be likely to substantially assist in connection with:

- (i) achieving a Part 5.3 object; or
- (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with; and”

The intention of repealing current Form 2A and substituting a new Form 2A is to ensure that the circumstances provided for in paragraph 46(4)(e) of the TIA Act are included in Form 2A and the relevant terms (“Part 5.3 supervisory order” and “Part 5.3 object”) are inserted.

Form 2B – Telecommunications service warrant for Part 5.3 supervisory order—B-party

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under subsection 46(4) of that Act to which subparagraph 46(4)(d)(ii) of that Act applies. The eligible Judge or nominated AAT member may use the form to authorise the interception of communications made to or from a telecommunications service as specified by the warrant where a Part 5.3 supervisory order is in force in relation to another person (within the meaning of section 6T of the Act), and the particular person is likely to communicate with the other person using the service.

Subsection 49(1) of the TIA 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 authority under subsection 46(4) of the TIA Act shall be in accordance with Form 2B in Schedule 1 to the Regulations.

Subsection 46(4) of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a named person Part 5.3 warrant. Paragraph 46(4)(e) of the TIA Act provides:

“(e) information that would be likely to be obtained by intercepting under a warrant communications made to or from the service would be likely to substantially assist in connection with:

- (i) achieving a Part 5.3 object; or
- (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with; and”

The intention of repealing current Form 2B and substituting a new Form 2B is to ensure that the circumstances provided for in paragraph 46(4)(e) of the TIA Act are included in Form 2A and the relevant terms (“Part 5.3 supervisory order” and “Part 5.3 object”) are inserted.

Form 2C – Telecommunications service warrant for post-sentence order application

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, under subsection 46(7) of that Act, to authorise the interception of communications made to or from a telecommunications service as specified by the warrant with respect to an individual who may be subject to a post-sentence order.

Subsection 49(1) of the TIA 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 authority under subsection 46(7) of the TIA Act shall be in accordance with Form 2C in Schedule 1 to the Regulations.

Subsection 46(7) of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a warrant. Subsection 46(8) of the TIA Act provides the matters to which the Judge or nominated AAT member must have regard to when exercising their discretion to issue such a warrant.

The intention of this amendment is to ensure law enforcement have the power to intercept communications that will provide contemporary evidence to assist in understanding an offender's level of risk, which will inform the decision of whether or not to apply for a post-sentence order in relation to that offender.

Clause 8 – Forms 4A and 4B in Schedule 1

Clause 8 of the Amending Regulations repeals existing Forms 4A and 4B in Schedule 1 to the TIA Regulations and substitutes new Forms 4A, 4B, 4C and 4D. The new Forms 4A and 4B include amendments consequential to the amendments made by the ESO Act; specifically, to include new terms, such as “Part 5.3 supervisory order” and “Part 5.3 object”, which were inserted as definitions into subsection 5(1) of the TIA Act by the amendments made in the ESO Act.

Clause 8 of the Amending Regulations creates new Forms 4C and 4D. New Forms 4C and 4D are consequential to amendments made by the ESO Act, to ensure law enforcement have the authority to intercept communications that will provide contemporary evidence to assist in understanding an offender's level of risk, which will inform the decision of whether or not to apply for a post-sentence order in relation to that offender.

Form 4A – Named person warrant for Part 5.3 supervisory order—telecommunications services

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under subsection 46A(2A) of that 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 who is subject to a Part 5.3 supervisory order (within the meaning of section 6T of the TIA Act) is using, or is likely to use.

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

Subsection 46A(2A) of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a named person warrant for a Part 5.3 supervisory order for the purposes of:

- a. achieving a Part 5.3 object; or
- b. determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with.

The intention of repealing current Form 4A and substituting a new Form 4A is to ensure that the circumstances provided for in paragraph 46A(2A) of the TIA Act are included in Form 4A and the relevant terms (“Part 5.3 supervisory order” and “Part 5.3 object”) are inserted.

Form 4B – Named person warrant for Part 5.3 supervisory order—telecommunications services

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under subsection 46A(2A) of that Act to which subparagraph 46A(2A)(e)(ii) of the Act applies, to authorise interceptions of communications made by means of a particular telecommunications device or particular communication devices that a named person who is subject to a Part 5.3 supervisory order (within the meaning of section 6T of the TIA Act) is using, or is likely to use.

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

Subsection 46A(2A) of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a named person warrant for a Part 5.3 supervisory order for the purposes of:

- a. achieving a Part 5.3 object; or
- b. determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with.

The intention of repealing current Form 4B and substituting a new Form 4B is to ensure that the circumstances provided for in paragraph 46A(2A) of the TIA Act are included in Form 4B and the relevant terms (“Part 5.3 supervisory order” and “Part 5.3 object”) are inserted.

Form 4C – Named person warrant for post-sentence order application—telecommunications services

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under subsection 46A(2C) of that Act to which subparagraph 46A(2C)(h)(i) of the Act applies, to authorise interceptions of communications made to or from any telecommunications service that a named person who may be subject to a post-sentence order is using, or is likely to use.

Subsection 49(1) of the TIA Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the TIA Regulations provides that a warrant issued by an issuing authority under subsection 46A(2C) of the TIA Act to which subparagraph 46A(2C)(h)(i) of the TIA Act applies, shall be in accordance with Form 4C in Schedule 1 to the TIA Regulations.

Subsection 46A(2D) of the TIA Act sets out the matters to which the Judge or nominated AAT member must have regard when determining to issue such a post-sentence order.

Form 4D – Named person warrant for post-sentence order application—telecommunications devices

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under subsection 46A(2C) of that Act to which subparagraph 46A(2C)(h)(ii) of the Act applies, to authorise interceptions of communications made by means of a particular telecommunications device or particular communication devices that a named person who may be subject to a post-sentence order is using, or is likely to use.

Subsection 49(1) of the TIA Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the TIA Regulations provides that a warrant issued by an issuing authority under subsection 46A(2C) of the TIA Act to which subparagraph 46A(2C)(h)(ii) of the TIA Act applies, shall be in accordance with Form 4D in Schedule 1 to the TIA Regulations.

Subsection 46A(2D) of the TIA Act sets out the matters to which the Judge or nominated AAT member must have regard when determining to issue such a post-sentence order.

Clause 9 – Subparagraph 1(3)(b)(i) of Form 5 in Schedule 1

This clause repeals subparagraph 1(3)(b)(i) of Form 5 in Schedule 1 to the TIA Regulations and substitutes a new subparagraph 1(3)(b)(i).

The amendment made to this paragraph clarify that the Judge or nominated AAT member would be empowered, under subsection 46(1) of the TIA Act, on the basis of the information given by the applicant agency, if the application had been made under section 46 of the TIA Act.

The intention of this amendment is to clarify the operation of the legislative provisions.

Clause 10 – After subparagraph 1(3)(b)(ii) of Form 5 in Schedule 1

This clause inserts new paragraphs 1(3)(b)(iia) and (iib) into Form 5 in Schedule 1. The effect of this amendment is that when determining whether a warrant for entry onto premises and interception of communications should be issued, a Judge or nominated AAT member considers, on the basis of the information given by the applicant agency, that (in addition to what is currently prescribed in Form 5):

- (if applicable) because of urgent circumstances, it was necessary to make the application by telephone; and
- there are reasonable grounds for suspecting that the particular person/persons mentioned is/are using, or is/are likely to use, the service.

These paragraphs are inserted to ensure that Form 5 is consistent with the other Forms in Schedule 1 to the TIA Regulations, which include equivalent provisions.

Clause 11 – Form 5A in Schedule 1

This clause repeals Form 5A from Schedule 1 to the TIA Regulations and substitutes a new Form 5A and Form 5B. New Form 5A includes amendments consequential to the amendments made by the ESO Act; specifically, to include new terms, such as “Part 5.3 supervisory order” and “Part 5.3 object”, which were inserted as definitions into subsection 5(1) of the TIA Act by the amendments made in the ESO Act.

New Form 5B is consequential to amendments made by the ESO Act to ensure law enforcement have the authority to install, maintain, use or recover equipment or a line, and intercept communications, that will provide contemporary evidence to assist in understanding an offender’s level of risk, which will inform the decision of whether or not to apply for a post-sentence order in relation to that offender.

Form 5A – Warrant for entry onto premises and interception of communications for Part 5.3 supervisory orders

The amendments to Form 5A by the Amending Regulations are consequential to the amendments made by the ESO Act to the TIA Act.

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under section 48 of that TIA Act, to authorise entry onto 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 TIA Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the TIA Regulations provides that a warrant issued by an issuing authority under section 48 of the TIA Act in relation to subsection 46(4) shall be in accordance with Form 5A in Schedule 1.

Where applicable, section 48 of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a warrant for entry onto premises and interception of communications.

Form 5B – Warrant for entry onto premises and interception of communications for post-sentence order applications

This form is to be used by an eligible Judge or nominated AAT member, within the meaning of the TIA Act, acting under section 48 of that Act, to authorise entry onto premises to install, maintain, use or recover equipment or a line, and intercept communications, where an agency was also able to apply for a warrant under subsection 46(7) of the Act, which authorises interceptions of communications to or from a service.

Subsection 49(1) of the TIA Act provides that a warrant shall be in accordance with the prescribed form. Section 8 of the TIA Regulations provides that a warrant issued by an issuing authority under section 48 of the TIA Act in relation to subsection 46(7) shall be in accordance with Form 5A in Schedule 1.

Subsection 46(8) of the TIA Act sets out the matters to which the Judge or nominated AAT member must have regard when determining whether to issue a warrant for a post-sentence order application.

Where applicable, section 48 of the TIA Act sets out the circumstances in which a Part 5.3 warrant agency may apply for a warrant for entry onto 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

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021

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

The purpose of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021* (Amending Regulations) is to implement the Commonwealth Extended Supervision Order (ESO) scheme to manage the unacceptable risk posed by convicted terrorist offenders to the community upon their release from custody. The ESO scheme was established by the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (the ESO Act) and forms part of the High Risk Terrorist Offenders (HRTTO) regime in Division 105A of Part 5.3 of the *Criminal Code Act 1995* (Code).

The Amending Regulations will amend the:

- (a) *Criminal Code Regulations 2019* (the Code Regulations)
- (b) *Telecommunications (Interception and Access) Regulations 2017* (the TIA Regulations).

The Code codifies the general principles of criminal responsibility under laws of the Commonwealth, and contains all the general principles of criminal responsibility that apply to any offence. Section 5 of the Code provides that the Governor-General may make regulations prescribing matters required or permitted by the Code to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Code. Paragraph 5(2)(f) of the Code provides that the Minister administering the *Australian Federal*

Police Act 1979 (AFP Minister) is the rule-maker for regulations made for the purpose of Part 5.3 (terrorism), other than Division 100 (preliminary provisions) of the Code.

The amendments to the Code Regulations made by the Amending Regulations are being made under section 5 of the Code to ensure that the AFP Minister is enabled to share and disclose information to a relevant expert, for the purposes of subsections 105A.19(1) and (3) of the Code.

The *Telecommunications (Interception and Access) Act 1979* (the TIA Act) protects the privacy of, and regulates access to, the content of telecommunications and telecommunications data. Section 300 of the TIA Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The Amending Regulations are amending the TIA Regulations, under section 300 of the TIA Act, to ensure that the forms and content of warrants are consistent and give effect to the relevant provisions in the TIA Act (pursuant to section 49 of the TIA Act).

Amendments to the Code Regulations

The HRTTO regime, established in Part 5.3 of the Code, comprises Division 105A, which provides for post-sentence orders (as amended by the ESO Act). Within this Division, subsections 105A.19(1) and (3) of the Code provide for the sharing (requesting and disclosing) of information between the AFP Minister and persons prescribed in section 10 of the Code Regulations (for the purposes of those subsections of the Code).

The Amending Regulations amend section 10 of the Code Regulations to add the following prescribed persons:

a person who is a relevant expert and who is:

- (i) appointed, by the AFP Minister under section 105A.18D of the Code; or
- (ii) otherwise engaged, by the AFP Minister, or a person on behalf of the AFP Minister,

to assess the risk of a terrorist offender committing a serious Part 5.3 offence (all within the meaning of Division 105A of the Code) for the purposes of that Division (whether under section 105A.18D of the Code or otherwise, and whether or not an application for a post-sentence order has been made).

This amendment will allow the AFP Minister to request information from, and disclose information to, a relevant expert who is engaged by the AFP Minister, for the purposes of conducting a risk assessment on a terrorist offender.

Amendments to the TIA Regulations

The Amending Regulations amend the TIA Regulations as a consequence of passage of the ESO Act. Specifically, the Amending Regulations will extend the telecommunications interception warrant forms contained within the TIA Regulations, currently available in relation to a control order, to also be available in relation to extended supervision orders and interim supervision orders.

The Amending Regulations also amend the TIA Regulations to extend the application of telecommunications service warrant forms and telecommunications named person warrant forms, currently available in relation to a control order, to also be available in relation to post-sentence orders. These amendments are consequential to the ESO Act and ensure the current warrant forms are amended to capture the new provisions and orders inserted into the legislation.

Human rights implications

The Amending Regulations engage the following rights:

- (a) the prohibition on the interference with privacy under article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), and
- (b) the right to life under article 6 of the ICCPR.

Prohibition on Arbitrary or Unlawful Interference with Privacy

Article 17 of the ICCPR provides that:

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.

Everyone has the right to the protection of the law against such interference or attacks.

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.

The UNHRC 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.

Amendments to the Code Regulations

Clause 1 of Schedule 1 of the Amending Regulations (Clause 1) engages the right to privacy by allowing, in limited circumstances, the sharing (requesting and disclosing) of information between the AFP Minister and the prescribed list of persons. The sharing of personal information without a person's consent will engage, and limit, the protection from arbitrary or unlawful interference with their privacy.

Sharing information with the prescribed list of persons is a permissible limitation on the right to privacy because the information would be shared to facilitate:

- if shared to the AFP Minister under subsection 105A.19(1) – the administration or execution of the HRTO regime, or
- if shared to a person prescribed under subsection 105A.19(3) – the exercise of the person's powers, or performance of the person's functions or duties.

This ensures any limitation on the right to privacy is lawful and only for the purpose of protecting the community from the unacceptable risk posed by terrorist offenders.

Clause 1 prescribes one new category of persons, thereby expanding the list of persons with whom information, where it relates to high risk terrorist offenders eligible for a post-sentence order, may be shared. The Amending Regulations prescribe a relevant expert who is engaged by the AFP Minister, or a person on behalf of the Minister, for the purpose of conducting a risk assessment in relation to an offender eligible to be made subject to an order under Division 105A of the Code.

The prescription of a relevant expert is the least rights-restrictive measure available because a relevant expert is in a position to assess the risk posed by an offender, drawing on their professional background and judgement, to ensure the risk assessment is undertaken in an objective and comprehensive manner.

Clause 1 expands the list of prescribed persons only for the purpose of conducting a risk assessment on a person. The measure is reasonable and proportionate. The limitation of the right to privacy by sharing personal information is for the legitimate purpose of assessing the risk an offender poses to the community in order to determine whether protective measures are necessary and proportionate to the risk posed. The sharing of such information will ensure that a relevant expert engaged to assess the risk posed by an offender has available the relevant information required to conduct their assessment accurately. This measure is imperative as the risk assessment may be used by the AFP Minister in determining whether to make an application under Division 105A of the Code, and may be considered by the court in determining the Minister's application. The purpose of this measure is to protect national security, public safety, address crime, and protect the rights and freedoms of individuals.

Clause 1 also works within the framework established by section 105A.19 of the Code, which limits the requesting of information to that which the AFP Minister reasonably believes to be

relevant to the administration or execution of Division 105A of the Code, and sharing of information with those who require the information to enable them to exercise their powers or perform their duties.

This framework appropriately limits the unnecessary or further disclosure of information. To the extent that the measures in Clause 1 limit the right in Article 17 of the ICCPR, they are reasonable, necessary and proportionate in achieving a legitimate objective.

Amendments to the TIA Regulations

The purpose of Clause 2 to Clause 9 of Schedule 1 of the Amending Regulations is to prescribe the forms for the issuing of warrants under sections 46, 46A and 48 of the TIA 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.

Part 5.3 warrants assist in the prevention of terrorist activity, monitoring ESOs and control orders, or determining whether it is appropriate for the AFP Minister to apply for a post-sentence order. The forms associated with these warrants require the inclusion of personal information which may limit the right to privacy. The information includes a person's name or other known identifying information, such as the person's date of birth, to ensure the warrant is applied to the intended target. 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. It also promotes the privacy of other individuals by ensuring the warrant is applied to the intended target.

This limitation is also 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 subject to the warrant and the eligible Judge or nominated Administrative Appeals Tribunal (AAT) member issuing the warrant.

To the extent that personal information is included on the form and disclosed to a Judge or nominated AAT member, the sharing of personal information is reasonable and necessary. Judicial oversight is also provided for in that the form is only issued and used by an eligible Judge or nominated AAT member for the purposes of issuing a warrant under sections 46, 46A and 48 of the Act, safeguarding the right to privacy. The Amending Regulations give effect to these provisions of the TIA Act by prescribing the relevant form for Part 5.3 warrants.

The right to life

Article 6 of the ICCPR places a positive obligation on States to protect an individual's right to life. The obligation to protect life requires the State to take preventative measures to protect individuals whose safety may be compromised in particular circumstances, such as by a terrorist act.

Amendments to the Code Regulations

Clause 1 promotes the right to life by protecting the community from the risk posed by convicted terrorist offenders. Item 1 allows, in limited circumstances, the sharing (requesting and disclosing) of information between the AFP Minister and a relevant expert engaged to assess the risk posed by a convicted terrorist offender. The objective of the risk assessment is to ensure that a terrorist offender who poses an unacceptable risk to the community is

managed commensurately with that risk, and is subject to a post-sentence order. The accuracy of a risk assessment relies on the accuracy and availability of information to inform that assessment.

Clause 1 ensures that a relevant expert engaged to assess the risk posed by an offender has available all the relevant information required to conduct their assessment accurately. To the extent that Item 1 enables a relevant expert and, subsequently, a court, to be informed in determining the level of risk posed by a terrorist offender, Item 1 prevents the risk posed to the community, and thereby prevents the risk posed to life, and promotes the inherent right to life in Article 6 of the ICCPR.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights. To the extent that this Disallowable Instrument may limit human rights, those limitations are reasonable, necessary and proportionate.

The Honourable Karen Andrews MP, Minister for Home Affairs