

EXPLANATORY STATEMENT

Issued by the Hon Peter Dutton MP, Minister for Home Affairs and the Minister for Immigration and Border Protection

Australian Border Force Act 2015

Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018

Authority

Section 58 of the *Australian Border Force Act 2015* (the ABF Act), provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Background

The *Australian Border Force Amendment (Protected Information) Act 2017* (the Amendment Act) amended the ABF Act to revise the secrecy and disclosure provisions contained within the ABF Act, to simplify the administration of those provisions.

The Amendment Act amended the ABF Act to:

- repeal the definition of *protected information* in subsection 4(1) of the ABF Act, and substitute a definition of *Immigration and Border Protection information* so that only specific kinds of information are covered by the secrecy and disclosure provisions in Part 6;
- add new permitted purposes for which *Immigration and Border Protection information* that contains personal information can be disclosed under the ABF Act. Subsections 46(na)-(nc) of the ABF Act provided a permitted purpose relating to inter-country adoption, protection of national security or defence of Australia, and location of missing persons;
- repeal paragraph 44(2)(d) of the ABF Act, removing the requirement that a disclosure of a class of protected information that contains personal information is made to a body or person prescribed in the *Australian Border Force (Secrecy and Disclosure) Rule 2015* (ABF Rule), and that the information is prescribed in the rules as a class of information that may be disclosed to that body or person;
- repeal paragraph 45(2)(d) of the ABF Act, removing the requirement that the disclosure of a class of protected information that contains personal information be made to a foreign country, agency, authority or organisation prescribed in the rules and that the class of information is prescribed in the rules as a class of information that may be disclosed to that foreign country, agency, authority or organisation.

Purpose of the *Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018*

As a result of the amendments to Part 6 of the ABF Act, consequential amendments to the ABF Rule are required. These amendments are made by the Amendment Rule and are:

- to repeal redundant section 6 of the ABF Rule which prescribes bodies, persons, foreign countries, agencies or authorities of foreign countries and public international organisations in Schedule 2, and the classes of information that may be disclosed to them in Schedule 3 for the purposes of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act;
- to repeal redundant Schedule 2 to the ABF Rule which prescribes bodies, persons, foreign agencies or authorities of foreign countries, and public international organisations and classes of information prescribed in Schedule 3 to the ABF Rule which may be disclosed to them, for the purposes of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act;
- to repeal redundant Schedule 3 to the ABF Rule which prescribes classes of information that may be disclosed to the persons and bodies prescribed in Schedule 2;
- to repeal the permitted purpose relating to defence or national security, prescribed in Schedule 4 to the ABF Rule, as this permitted purpose was added to the ABF Act at paragraph 46(nb) by the Amendment Act and is therefore redundant in the ABF Rule.

Section 46 of the ABF Act provides permitted purposes for which an authorised entrusted person may disclose *Immigration and Border Protection information* that contains personal information for the purposes of sections 44 and section 45 of the ABF Act. The *Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018* (Amendment Rule) prescribes two new permitted purposes under paragraph 46(o) of the ABF Act. These are:

- a purpose relating to assisting in the detection or identification of persons who may pose a possible risk to Australia or a foreign country;
- a purpose relating to the investigation or assisting in the investigation of potential misconduct or a potential integrity issue.

These new permitted purposes are required to enable the effective disclosure of *Immigration and Border protection information* to foreign governments, agencies and bodies (including public international organisations) and domestic persons and bodies mentioned in section 44(4) in additional circumstances.

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

A Statement of Compatibility with Human Rights for the Amendment Rule above has been prepared and is at [Attachment B](#).

Commencement

The Amendment Rule is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Rule commences on the day after it is registered on the Federal Register of Legislation.

**The Hon Peter Dutton MP, Minister for Home Affairs and the Minister for
Immigration and Border Protection**

ATTACHMENT A***Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018*****Section 1 – Name**

This section provides that the title of the Rule is the *Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018* (the Amendment Rule).

Section 2 – Commencement

This section sets out, in a table, the date on which the Amendment Rule will commence, and provides that each provision of the instrument as specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of that table, and that any other statement in column 2 is to have effect according to its terms.

The Amendment Rule commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Amendment Rule is made under the *Australian Border Force Act 2015* (the ABF Act).

Section 4 – Schedule(s)

This section provides for each instrument that is specified in a Schedule to the Amendment Rule amended or repealed as set out in the applicable items in the Schedule concerned, and for any other item in a Schedule to this instrument to have effect according to its own terms. The Amendment Rule contains one Schedule.

Schedule 1 – Amendments***Australian Border Force (Secrecy and Disclosure) Rule 2015*****Item 1 – Section 6**

This item is consequential to the repeal of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act by the *Australian Border Force Amendment (Protected Information) Act 2017* (the Amendment Act). The item repeals section 6 of the *Australian Border Force (Secrecy and Disclosure) Rule 2015* (ABF Rule). Section 6 prescribes bodies, persons, foreign countries, agencies or authorities of foreign countries and public international organisations in Schedule 2, and the classes of information that may be disclosed to them in Schedule 3 for the purposes of repealed paragraphs 44(2)(d) and 45(2)(d) of the ABF Act. As a consequence of the repeal of these paragraphs 44(2)(d) and paragraph 45(2)(d) of the ABF Act, section 6 is therefore redundant and should be repealed by the Amendment Rule.

Item 2 – Schedule 2

This amendment is consequential to the repeal of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act by the Amendment Act.

The repeal of paragraph 44(2)(d) removed the requirement that the disclosure of a class of protected information that contains personal information be made to a body or person prescribed in the rules and that the class of information is prescribed in the rules as a class of information that may be disclosed to that body or person.

For the purposes of paragraph 44(2)(d), section 6 of the ABF Rule and Parts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Schedule 2 of the ABF Rule prescribed bodies and persons to which an authorised entrusted person may disclose a class of protected information that contains personal information, and Schedule 3 prescribed the classes of information that could be disclosed to each of those prescribed bodies and persons.

The repeal of paragraph 45(2)(d) removed the requirement that a disclosure of a class of protected information that contains personal information is made to a foreign country, agency, authority or organisation prescribed in the ABF Rule, and that the information is prescribed in the ABF Rule as a class of information that may be disclosed to that foreign country, agency, authority or organisation.

For the purposes of paragraph 45(2)(d), Part 10 of Schedule 2 of the rules prescribes foreign countries, agencies, authorities or organisations to which an authorised entrusted person may disclose protected information that contains personal information. Part 10 of Schedule 3 of the rules prescribes the classes of information that can be disclosed to each of those foreign countries, agencies, authorities and organisations.

As a result of the repeal of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act by the Amendment Act, Schedule 2 is redundant therefore is repealed by the Amendment Rule.

Item 3 – Schedule 3

This is a consequential amendment to the repeal of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act by the Amendment Act.

Paragraph 44(2)(d) of the ABF Act was repealed by the Amendment Act. It provided that an authorised entrusted person may disclose protected information that contains personal information to a body or person mentioned in subsection (4) for a purpose mentioned in section 46 if, in relation to a class of protected information, that body or person is prescribed in the rules and that class of information is prescribed in the rules as a class of information that may be disclosed to that body or person. The classes of information for the purposes of paragraph 44(2)(d) were prescribed in Schedule 3 of the ABF Rule.

Paragraph 45(2)(d) of the ABF Act was repealed by the Amendment Act. It provided that an authorised entrusted person may disclose protected information that contains personal information, to a foreign country, an agency or authority of a foreign country or a public international organisation for a purpose mentioned in section 46 of the ABF Act if, in relation to a class of protected information, that foreign country, agency, authority or organisation is

prescribed in the rules and that class of information is prescribed in the rules as a class of information that may be disclosed to that foreign country, agency, authority or organisation. The classes of information for the purposes of paragraph 45(2)(d) were prescribed in Schedule 3 of the ABF Rule.

As a result of the repeal of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act by the Amendment Act, Schedule 3 is redundant and therefore repealed by the Amendment Rule.

Item 4 – Item 1 of Schedule 4

Section 46 of the ABF Act provides permitted purposes for which an authorised entrusted person may disclose *Immigration and Border Protection information* that contains personal information for the purposes of subsection 44(2)(b) and subsection 45(2)(b) of the ABF Act.

Under subsection 44(2) of the ABF Act, an authorised entrusted person may disclose *Immigration and Border Protection information* that contains personal information to a body or person mentioned in subsection 44(4) of the ABF Act if the Secretary is satisfied that the disclosure is necessary for a purpose mentioned in section 46 of the ABF Act, provided the other requirements in subsection 44(2) are met.

Under subsection 45(2) of the ABF Act, an authorised entrusted person may disclose *Immigration and Border Protection information* that contains personal information to a foreign country, agency or authority or organisation in accordance with an agreement if the Secretary is satisfied that the disclosure is necessary for a purpose listed in section 46 of the ABF Act, provided the other requirements in subsection 45(2) are met.

Paragraph 46(o) of the ABF Act provides a permitted purpose may be a purpose prescribed by the rules.

Section 7 of the ABF Rule provides that for paragraph 46(o) of the ABF Act, the purposes mentioned in Schedule 4 are prescribed. Schedule 4 of the ABF Rule prescribed a permitted purpose relating to defence or national security.

The Amendment Act inserted a new permitted purpose at paragraph 46(nb) of the ABF Act relating to the protection of national security or the defence of Australia. This permitted purpose was moved into the ABF Act for ease of reference. As a result the permitted purpose at item 1 of Schedule 4 of the ABF Rule is redundant and is repealed.

Two new permitted purposes are added to Schedule 4. The first is a purpose relating to assisting in the detection or identification of persons who may pose a risk to Australia or a foreign country. The reason for this new purpose is to facilitate the disclosure of *Immigration and Border Protection information* under sections 44 and 45 of the ABF Act when there are concerns that particular individuals may pose a risk to either Australia or a foreign country.

The second is a purpose relating to the investigation or assisting in the investigation of potential misconduct or a potential integrity issue. The reason for this new purpose is to facilitate the disclosure of *Immigration and Border Protection information* under section 44 and section 45 of the ABF Act for the investigation or assisting in the investigation of potential misconduct or integrity issues.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018

This Legislative Instrument, entitled the *Australian Border Force (Secrecy and Disclosure) Amendment (2018 Measures No. 1) Rule 2018* (the Amendment Rule), 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

Amendments to the *Australian Border Force Act 2015* (the ABF Act) by the *Australian Border Force Amendment (Protected Information) Act 2017* (the Amendment Act) repealed paragraphs 44(2)(d) and 45(2)(d) of the Act, removing the need for the *Australian Border Force (Secrecy and Disclosure) Rule 2015* (the ABF Rule) to prescribe classes of protected information that can be disclosed and bodies to whom classes of information can be disclosed. As such, section 6 and Schedules 2 and 3 of the Rule are redundant. The Amendment Rule amends the ABF Rule to repeal section 6, Schedule 2 and Schedule 3.

Further, the Amendment Act inserted paragraph 46(nb) into the ABF Act, prescribing a purpose in relation to the protection of national security or the defence of Australia as a permitted purpose. This permitted purpose is replicated in similar terms in item 1 of Schedule 4 of the ABF Rule and as such item 1 of Schedule 4 is no longer necessary. The Amendment Rule amends the ABF Rule to repeal item 1 of Schedule 4.

The Amendment Rule adds two new permitted purposes to Schedule 4 to the ABF Rule for which *Immigration and Border Protection information* that contains personal information may be disclosed under subsection 44(2) and subsection 45(2) of the ABF Act.

Broadly, subsection 44(2) of the ABF Act permits an entrusted person who is authorised by the Secretary to disclose *Immigration and Border Protection information* that contains personal information to a body or person in subsection 44(4) if (amongst other requirements):

- The Secretary is satisfied that the information will enable or assist that body or person to perform or exercise their functions, duties or powers; and
- The Secretary is satisfied that the disclosure is necessary for a permitted purpose mentioned in section 46 of the ABF Act.

Broadly, subsection 45(2) of the ABF Act permits an entrusted person who is authorised by the Secretary to disclose *Immigration and Border Protection information* that contains personal information to a foreign country, an agency or authority of a foreign country, or a public international organisation if:

- The Secretary is satisfied that the information will be used in accordance with an agreement; and
- The Secretary is satisfied that the disclosure is necessary for a permitted purpose mentioned in section 46 of the ABF Act; and
- That foreign country, agency, authority or organisation has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.

Permitted Purpose 1 - a purpose relating to assisting in the detection or identification of persons who may pose a possible risk to Australia or a foreign country.

The purpose of this amendment is to set out an additional purpose under which *Immigration and Border Protection information* can be disclosed by an entrusted person, assuming all the other requirements in section 44 or section 45 are met.

The reason for this new purpose is to facilitate the disclosure of *Immigration and Border Protection information* under section 44 and section 45 of the ABF Act when there are concerns that particular individuals may pose a risk to either Australia or a foreign country.

Permitted Purpose 2 – a purpose relating to the investigation or assisting in the investigation of potential misconduct or integrity issues.

The purpose for this amendment is to set out an additional purpose under which *Immigration and Border Protection information* can be disclosed, assuming all the other requirements in section 44 or section 45 are met.

The reason for this new purpose is to facilitate the disclosure of *Immigration and Border Protection information* under section 44 of the ABF Act to Commonwealth, State and Territory bodies for the investigation or assisting in the investigation of potential misconduct or integrity issues.

This purpose can also be relied on for disclosure of *Immigration and Border Protection information* under section 45 of the ABF Act to foreign countries (including agencies/authorities of foreign countries and public international organisations) if all the requirements in this provision are met.

Human rights implications

Repeal of Section 6, Schedule 2, Schedule 3, and item 1 of Schedule 4

The amendments repeal section 6 of the ABF Rule and Schedules 2 and 3 to the ABF Rule to reflect the repeal of paragraphs 44(2)(d) and 45(2)(d) of the ABF Act. The amendments also repeal item 1 of Schedule 4 to the Rule to reflect the insertion of paragraph 46(nb) to the ABF Act, which made item 1 of Schedule 4 redundant. The proposed amendments do not alter any

of the requirements in relation to the disclosure of information which are provided for under the ABF Act. The repeal of section 6 of the ABF Rule along with the repeal of Schedule 2 and Schedule 3, and item 1 of Schedule 4 to the ABF Rule is compatible with human rights as it does not raise any human rights issues.

Schedule 4 of the Amendment Rule - Permitted Purpose 1 and Permitted Purpose 2

This Amendment Rule engages the following rights:

Prohibition on Arbitrary or Unlawful Interference with Privacy

1. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides that:
 - (1) 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.
 - (2) Everyone has the right to the protection of the law against such interference or attacks.
2. The Amendment Rule engages the prohibition on arbitrary or unlawful interference with privacy contained in Article 17 of the ICCPR. Although the United Nations Human Rights Committee (UNHRC) has not defined ‘privacy’, it is understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The Amendment Rule does not have the effect of intruding into privacy on an unwarranted or unreasonable basis.
3. The Amendment Rule adds two permitted purposes:
 - A purpose relating to assisting in the detection or identification of persons who may pose a possible risk to Australia or a foreign country;
 - A purpose relating to the investigation or assisting in the investigation of potential misconduct or a potential integrity issue.
4. The term ‘unlawful’ means that no interference can take place except as authorised under domestic law. Additionally, the term ‘arbitrary’ means that an imposition on privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.
5. The Amendment Rule does not alter the requirements for the disclosure of *Immigration and Border Protection information* under sections 44 or section 45 of the ABF Act. Disclosures under the ABF Act can only occur if the legal requirements in the relevant provisions have been satisfied.
6. Requirements in section 45 of the ABF Act include (in part) that the Secretary is satisfied that the information will be used in accordance with the agreement in force between the Commonwealth, agency, authority of a foreign country or an organisation. The Secretary under subsection 45(5) of the ABF Act may, by writing,

impose conditions to be complied with by a foreign country, an agency or authority of a foreign country or a public international organisation in relation to *Immigration and Border Protection information*. Further, the recipient is required to provide an undertaking not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.

7. Similarly, the requirements under section 44 of the ABF Act include (in part) that the Secretary is satisfied that the information will enable or assist that body or person to perform or exercise their functions, duties or powers. Furthermore, a requirement common to both section 44 and section 45 of the ABF Act is that the Secretary is satisfied that the disclosure of personal information is necessary for a permitted purpose mentioned in section 46 of the ABF Act. Therefore, the inclusion of the two new permitted purposes by the Amendment Rule does not alter the requirements for lawful disclosure under the ABF Act. The purposes will be subject to the requirements under section 44 and 45 of the ABF Act.
8. Additionally, the two new permitted purposes will not arbitrarily interfere with privacy in contravention of Article 17 of the ICCPR as the disclosure of *Immigration and Border Protection information* that relies on either purpose in Schedule 4 of the Amendment Rule will be subject to the requirements under section 44 and section 45 of the ABF Act. The first new permitted purpose would only be used in the identification or detection of individuals that may pose a risk to Australia or a foreign country. Similarly, the second new purpose would only be used for assisting in the investigation of potential misconduct or integrity issues.
9. Therefore, the addition of new permitted purposes is not an unlawful or arbitrary imposition on the right to privacy and is consistent with Australia's obligations under Article 17 of the ICCPR.

The right to freedom of movement

10. Article 12(2) of the ICCPR provides that "everyone shall be free to leave any country, including his own".
11. The two new permitted purposes do not limit a person's right to leave Australia under Article 12(2) of the ICCPR, as they do not impose any restrictions on a person's departure from Australia.
12. Additionally, Article 12(4) of the ICCPR provides "no one shall be arbitrarily deprived of the right to enter his own country". To any extent that the new permitted purposes may affect a person's ability to enter a country, this would be subject to the other country's own risk assessments and immigration procedures. Importantly, the two new permitted purposes will not limit a person's ability to enter their own country and therefore are consistent with Article 12(4) of the ICCPR.

Conclusion

13. The amendment to repeal section 6, Schedule 2, Schedule 3 and item 1 of Schedule 4 of the ABF Rule is compatible with human rights and does not raise any human rights issues.

14. The amendment to insert the two new purposes mentioned above is compatible with human rights to the extent any potential impact on an individual's human rights is necessary and proportionate. The amendments do not alter any of the legal requirements for disclosure of *Immigration and Border Protection information* which are already provided for in the ABF Act.

**The Hon Peter Dutton MP, Minister for Home Affairs and the Minister for
Immigration and Border Protection**

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