EXPLANATORY STATEMENT

***Electoral and Referendum Amendment (Official Secretary to the Governor‑General) Regulations 2018***

Issued by Authority of the Special Minister of State

*Commonwealth Electoral Act 1918*

**Legislative Authority**

Section 395 of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that the Governor-General may make regulations, not inconsistent with the Electoral Act, prescribing all matters which by the Electoral Act are required or permitted to be prescribed, or necessary or convenient to be prescribed for giving effect to the Electoral Act.

**Background**

The Office of the Official Secretary to the Governor-General (OOSGG) administers the Australian Honours and Awards system, which includes the Order of Australia (the Order), the Australian Bravery Decorations (Bravery) and other merit and service awards. These are the nation’s highest and most prestigious means of recognising outstanding members of the Australian community. In respect of the Order, the OOSGG identified that community nominations were being discouraged by the burden on nominators to find some of the necessary information relating to nominees. In response, the OOSGG has streamlined the nomination process, with the consequence that it now carries a greater burden in respect of the administrative responsibilities associated with identifying and researching nominees. In respect of Bravery nominations, the OOSGG often receives insufficient details about a nominee to be able to process the nomination. In both cases, access to Commonwealth electoral Roll information would facilitate the OOSGG’s identification or location of nominees and referees who cannot be identified or located based only on the information already in the OOSGG’s possession.

**Purpose and operation**

The purpose of the *Electoral and Referendum Amendment (Official Secretary to the Governor-General) Regulations 2018* (the Amendment Regulation) is to amend the *Electoral and Referendum Regulation 2016* (the Electoral Regulation) to permit the Electoral Commission to give Commonwealth electoral Roll information (Roll information) to the OOSGG for specified purposes. There are two purposes specified by the Amendment Regulation, namely the identification or location of individuals who are nominated, or are being considered for nomination, for an honour or award within the Australian Honours and Awards system, and the identification or location of individuals who have been selected to provide a reference connected with such a nomination. The Amendment Regulation will also permit the OOSGG to use the Roll information it receives for these purposes (collectively referred to as purposes relating to the Australian Honours and Awards system).

Item 4 of the table in subsection 90B(4) of the Electoral Act establishes a scheme whereby the Electoral Commission can provide Roll information to a prescribed authority in the circumstances authorised by the Electoral Regulation. The definition of ‘prescribed authority’ in section 4 of the Electoral Act includes the chief executive officer of an authority of the Commonwealth that is specified as a prescribed authority in regulations made for the purposes of the definition. Section 6 of the Electoral Regulation specifies prescribed authorities to be the Agencies and authorities of the Commonwealth mentioned in the column headed ‘Agency or authority’ of the table in clause 1 of Schedule 1. Section 9 of the Electoral Regulation prescribes the permitted purposes for which these prescribed authorities may use certain information. The Amendment Regulation will insert the OOSGG into the table in clause 1 of Schedule 1 to the Electoral Regulation, specifying it as a prescribed authority for the purposes of item 4 of the table in subsection 90B(4) of the Electoral Act. The Amendment Regulation will also insert the permitted purposes for which the Electoral Commission may provide Roll information, and for which the OOSGG may use the Roll information.

Details of the proposed Amendment Regulation are set out in the **Attachment.**

**Consultation**

Consultation regarding this amendment to the Electoral Regulation was undertaken between the Special Minister of State, the Minister for Finance, the Official Secretary to the Governor‑General, the OOSGG, the Department of Finance, and the Australian Electoral Commission. This consultation resulted in agreement that the OOSGG be inserted by the Amendment Regulation as a prescribed authority in clause 1 of Schedule 1 to the Electoral Regulation, and that Roll information may be provided by the Electoral Commission to the OOSGG, and subsequently used by the OOSGG, for the prescribed purposes relating to the Australian Honours and Awards system.

**Statement of compatibility with Human Rights**

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

***Electoral and Referendum Amendment (Official Secretary to the Governor-General) Regulations 2018***

The *Electoral and Referendum Amendment (Official Secretary to the Governor-General) Regulations 2018* (the Amendment Regulation) 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 disallowable Legislative Instrument**

Section 395 of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that the Governor-General may make regulations, not inconsistent with the Electoral Act, prescribing all matters which by the Electoral Act are required or permitted to be prescribed, or necessary or convenient to be prescribed for giving effect to the Electoral Act.

The Amendment Regulation amends the *Electoral and Referendum Regulation 2016* (the Electoral Regulation) to insert the Office of the Official Secretary to the Governor-General (OOSGG) into the table in clause 1 of Schedule 1 to the Electoral Regulation, specifying it as a prescribed authority for the purposes of item 4 of the table in subsection 90B(4) of the Electoral Act. As a prescribed authority, the Electoral Commission may then give OOSGG Commonwealth electoral Roll information for the prescribed purpose described in the table in clause 1 to Schedule 1. The prescribed purpose specified by the Amendment Regulation, is for the identification or location of individuals who are nominated, or are being considered for nomination, for an honour or award within the Australian Honours and Awards system, and the identification or location of individuals who have been selected to provide a reference connected with such a nomination.

**Human rights implications**

The Regulation engages the following human rights:

Article 17 of the International Covenant on Civil and Political Rights (the ICCPR) provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. It further sets out that everyone has the right to the protection of the law against such interference or attacks.

Australia accepts the principles stated in Article 17, subject to the right to enact and administer laws which, insofar as they authorise action which impinges on a person’s privacy, family, home or correspondence, are not arbitrary. That is, such laws must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

The intention of the Amendment Regulation is to facilitate the legitimate and desirable civic objective of conferring privilege (an Honour or Award) on members of the Australian community. There is no suggestion that the Amendment Regulation could lead to an individual suffering detriment or harm. Furthermore, individuals may choose to accept an honour or award or not, and if they refuse, the fact of an offer remains confidential. No harm ensues from a person declining an offer. The provisions of the Amendment Regulation are rationally connected to achieving that objective in that they assist the administrator of the Australian Honours and Awards system (namely the OOSGG) to identify and locate nominees and referees who cannot be identified or located based only on the information already in the OOSGG’s possession. The provision of identifying information through the Amendment Regulation preserves the long-standing practice of confidentiality around the process of consideration for honours and awards. This strict confidentiality affords two important benefits. The first is that the Australian Honours and Awards system operates on the principles of independence and freedom from political patronage. It is important that the consideration process is not susceptible to attempts to influence outcomes. Limiting awareness of a person’s nomination, and references sought, through strict confidentiality, assists to achieve this objective. Secondly, it is of benefit to the individual to be unaware of their nomination until, and only if, their nomination is successful. Altering this may lead to processing inconsistencies amongst nominees. For example, if consent were required for disclosure, it would create two classes of nominees – one class that is aware of their nomination, and so able to take action which might influence the outcome, and another class that is unaware. Another undesirable consequence of nominees being aware of their nomination is that they may suffer personal and reputational embarrassment, and disappointment, if the nomination is unsuccessful.

The provisions of the Amendment Regulation are proportionate to achieving that objective in that they remain subject to legislative checks and limitations, including the kind of information that can be provided and the circumstances in which it can be provided. These are explained in further detail below.

The disclosure of Roll information is protected in the first instance by the discretion of the Electoral Commission, which can decide whether or not to provide information, as well as what information to provide and the manner in which the information may be provided to prescribed authorities. The provision of this information may also only be done on payment of the fee (if any are payable). Roll information may only be given for the specified purpose in the Electoral Regulation. The kind of information which may be provided is limited to the information on a Roll (currently name and residential address), and any information held by the Australian Electoral Commission about the sex, date of birth or occupation of a person whose name is included on the Roll. The information would be used solely for the purpose of positively identifying nominees and referees where that information is not otherwise available through information supplied by nominators or on the public record; and to contact successful nominees. Any interference with personal privacy would be minimal (given the limited sensitivity of the information in question) and, if used to contact the nominee or referee, would be in pursuit of conferral of a privilege – an honour or award.

Despite the Amendment Regulation, subsection 90B(6) of the Electoral Act prohibits the Electoral Commission from providing information to prescribed authorities about any person whose address has been excluded or deleted from a Roll under section 104 of the Electoral Act (i.e. ‘silent electors’). Such persons are protected by this provision in circumstances where the Electoral Commissioner is satisfied that having their address shown on a Roll would place their personal safety, or the safety of their family, at risk. Similarly, subsection 90B(8A) of the Electoral Act would prohibit the Electoral Commission from providing to the OOSGG certain information about defence and Australian Federal Police personnel. The Amendment Regulation will not override these statutory prohibitions.

The Amendment Regulation inserts the OOSGG as a prescribed authority into the table in clause 1 of Schedule 1 to the Electoral Regulation. Where the Electoral Commission decides to give Roll information to the OOSGG, the OOSGG will be able to use the Roll information it receives for the purposes set out in that table as inserted by the Amendment Regulation, namely purposes relating to the Australian Honours and Awards system. The award process is confidential, and individuals can choose not to accept an award made to them if they wish.

Electoral Roll information will only be accessed by a controlled number of OOSGG staff directly involved in preparing, recording, researching and managing award nominations. There are approximately 14 such OOSGG staff, operating in an IT environment that complies with Australian Government requirements for storing personal identifying information. It is estimated that Roll information may eventually be required to positively identify nominees in approximately 5% of all cases, or around 100 nominees per year, and approximately 1% of all referees contacted, or around 150 referees per year. The relevant staff will only use the information received to confirm a nominee’s enrolment (avoiding a lengthy off-line citizenship/residency check in some cases), and to identify, locate and contact persons nominated for an award or selected to provide reference for persons nominated for an award.

Given the above limitations, the Amendment Regulation is a permissible limitation on Article 17 of the ICCPR as it is reasonable, necessary and sufficiently precise to ensure that it operates only to further the legitimate and desirable civic objective of recognising and honouring outstanding members of the Australian community by the responsible Commonwealth authority.

*Conclusion*

The Amendment Regulation is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Attachment**

**Details of the proposed *Electoral and Referendum Amendment (Official Secretary to the Governor-General) Regulations 2018***

**Section 1 - Name of Regulation**

This section would provide that the title of the Amendment Regulation is the *Electoral and Referendum Amendment (Official Secretary to the Governor-General) Regulations 2018* (the Amendment Regulation)*.*

**Section 2 - Commencement**

This section would provide for the Amendment Regulation to commence the day after registration on the Federal Register of Legislation.

**Section 3 - Authority**

This section would provide that the Amendment Regulation is made under the *Commonwealth Electoral Act 1918*.

**Section 4 – Schedules**

This section provides that the items specified in a Schedule to the Amendment Regulation are amended, repealed or have effect as specified or set out in the items in the relevant Schedule.

Schedule 1 – Amendments

The table in Clause 1 of Schedule 1 to the *Electoral and Referendum Regulation 2016* (the Electoral Regulation) sets out all the Commonwealth agencies which the Electoral Commission may provide with Roll information and the purposes for which that information may be used.

The Amendment Regulation inserts new item 26 to the table at clause 1 of Schedule 1 to the Electoral Regulation. New item 26 inserts the Office of the Official Secretary to the Governor-General as a prescribed authority which the Electoral Commission may provide Roll information to. It also inserts the purpose for which the information may be used, being identifying or locating individuals who are nominated, or are being considered for nomination, for an honour or award within the Australian Honours and Awards system, or have been selected to provide a reference connected with such a nomination.