

EXPLANATORY STATEMENT

Migration Regulations 1994

Access to Movement Records Amendment Instrument 2017

(Regulation 3.10A)

1. Instrument IMMI 17/063 is made under regulation 3.10A of the *Migration Regulations 1994* (the Regulations) and amends the *Access to Movement Records Instrument 2016/090* (the Principal Instrument).
2. The Principal Instrument operates to specify employees and agencies of the Commonwealth, states and territories who can be authorised to perform one or more actions that are prohibited by subsection 488(1) of the *Migration Act 1958* (the Act) for a purpose specified in the instrument. These matters are specified under subregulation 3.10A(2) of the Regulations for paragraph 488(2)(g) of the Act.
3. Subsection 488(1) of the Act provides that a person must not read, examine, reproduce, use or disclose any part of the movement records. However, paragraph 488(2)(g) of the Act permits the Minister to authorise a prescribed employee of a prescribed agency of the Commonwealth, a State or Territory, to perform one or more of those actions for a prescribed purpose. Subregulation 3.10A(2) of the Regulations allows for certain matters to be specified in an instrument in writing. These matters are set out in the Principal Instrument.
4. The purpose of this amending instrument is to provide, in column 4 of item 1 of Schedule B to the Principal Instrument, that an additional purpose for which a departmental officer or contractor may perform one or more of the actions prohibited by subsection 488(1) of the Act is to assist both the Australian Federal Police, and State and Territory police forces, with missing persons investigations.
5. There is an existing requirement in Column 3 of Item 1 of Schedule B to the Principal Instrument that a departmental officer or contractor can only perform one or more of the actions prohibited by subsection 488(1) of the Act for the purpose of assisting police with missing persons investigations, in the course of carrying out their official

duties or performing official functions and only if the access is required to enable proper or efficient performance of their duties or functions.

6. The Australian Federal Police and state and territory police were consulted regarding the expanded purposes for which departmental officers may access and use the movement records database.
7. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 23141).
8. The officer (Senior Executive Service, Band 1, Operational Strategies Branch) who made the instrument was delegated the powers required to make the instrument in the Instrument of Delegation DEL 17/077, signed on 9 November 2017.
9. Under section 42 of the *Legislation Act 2003*, the instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided.
10. The instrument commences on the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Access to Movement Records Amendment Instrument 2017

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

Subsection 488(1) of the Act provides that a person may not read, examine, reproduce by any means, use, or disclose by any means any part of the movement records, otherwise than in accordance with an authority given under subsection 488(2).

Movement records are records or information stored on a notified database. The notified database is currently the Movement Data Base. This database contains arrival and departure records of travellers to and from Australia dating from 1981. They may include a traveller's name, date of birth, gender and relationship status, country of birth, departure and/or arrival date, travel document number and country, port code and flight/vessel details, visa subclass and expiry date, and the number of movements.

The circumstances in which the Minister may authorise a person to perform one or more of the actions prohibited by subsection 488(1) include where the action is required for the purposes of prescribed legislation (subparagraph 488(2)(a)(vii)) and where the action is being performed by a prescribed employee of a prescribed agency for a prescribed purpose (paragraph 488(2)(g)).

Subsection 5(1) of the Act defines 'prescribed' to mean prescribed by the regulations. The regulation which prescribes the matters for the purposes of subparagraph 488(2)(a)(vii) and paragraph 488(2)(g) is regulation 3.10A of the *Migration Regulations 1994 (Cth)*.

Regulation 3.10A states:

- (1) For subparagraph 488(2)(a)(vii) of the Act, Commonwealth, State or Territory legislation specified by the Minister in an instrument in writing for this subregulation is prescribed.

Note: Under subsection 488(1) of the Act, a person must not read, examine, reproduce, use or disclose any part of the movement records. However, subparagraph 488(2)(a)(vii) of the Act permits the Minister to authorise an officer to perform one or more of those actions for the purposes of prescribed Commonwealth, State or Territory legislation.

- (2) For paragraph 488(2)(g) of the Act:

- (a) an agency of the Commonwealth, a State or a Territory specified by the Minister in an instrument in writing for this paragraph is prescribed; and
- (b) an employee of a prescribed agency who is specified by the Minister in an instrument in writing for this paragraph is prescribed; and

- (c) a purpose specified by the Minister in an instrument in writing for this paragraph is prescribed.

Note: Under subsection 488(1) of the Act, a person must not read, examine, reproduce, use or disclose any part of the movement records. However, paragraph 488(2)(g) of the Act permits the Minister to authorise a prescribed employee of a prescribed agency of the Commonwealth, or of a state or Territory, to perform one or more of those actions for a prescribed purpose.

The *Access to Movement Records 2016/090* signed on 2 September 2016 (the Principal Instrument) prescribes the legislation for the purposes of subparagraph 488(2)(a)(vii) and employees, agencies and purposes for the purposes of paragraph 488(2)(g) of the Act.

This amending Instrument updates the information contained in the Principal Instrument.

This update serves to permit departmental officers to disclose movement records to the Australian Federal Police (AFP) and state and territory police forces for the purposes of locating missing persons (a police function that is additional to law enforcement functions, which are accounted for in paragraph 488 (2)(e) of the Act).

Human rights implications

This Legislative Instrument engages the prohibition against arbitrary or unlawful interference with privacy in that it seeks to control government access to the personal information contained in movement records. However, the disclosure of movement records as authorised by this Instrument will not be an arbitrary or unlawful interference with privacy. Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) states 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.’

Article 17(2) of the ICCPR states that:

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

The disclosure of movement records will be lawful as authorised by this Instrument. To the extent that the changes to the Instrument may limit the right to privacy through the sharing of movement records information, this is necessary, reasonable and proportionate in meeting the policy objectives of regulation 3.10A, that is to facilitate government and law enforcement agencies in the exercise of their functions and duties.

Further, the protection of the right in Article 17(1), and consistent with the requirement in Article 17(2), is set out in domestic Australian law in the *Privacy Act 1988* (the Privacy Act). The Privacy Act contains the Australian Privacy Principles which regulate how agencies may collect, use, disclose and store, personal information, and how individuals may access and correct personal information held about them. Given that the proposed dissemination of the information in the Movements Reconstruction database will be executed in accordance with the Privacy Act, the personal information contained in this database will be afforded the legal protection of the Privacy Act. Additionally, the Instrument itself provides lawful protections in that it restricts the disclosure of the personal information in movement records to officers in particular agencies acting under particular legislation and purposes specified in the Instrument.

Conclusion

To the extent the Instrument may limit the right to privacy, as discussed above, this is necessary in furtherance of a legitimate goal and is proportionate to that goal. This change is compatible with the relevant human rights obligations for the reasons outlined above.

The Hon. Peter Dutton MP
Minister for Home Affairs
Minister for Immigration and Border Protection