

EXPLANATORY STATEMENT

Migration Regulations 1994

Migration (LIN 20/033: Access to Movement Records) Instrument 2020

(regulation 3.10A)

1. The instrument, LIN 20/033, is made under regulation 3.10A of the *Migration Regulations 1994* (the Regulations).
2. Regulation 3.10A provides for access to **movement records**, as defined under subsection 5(1) of the *Migration Act 1958* (the Act). Access to information contained in movement records is often necessary for the proper administration of a variety of legislation and for a number of purposes. The instrument therefore seeks to facilitate this and to assist relevant agencies and their officers and employees in performing statutory duties and associated functions effectively.
3. Subsection 488(1) of the Act prohibits a person from reading, examining, reproducing, using or disclosing any part of the movement records. However, subparagraph 488(2)(a)(vii) of the Act permits the Minister to authorise an **officer**, as defined under subsection 5(1) of the Act, to perform for the purposes of any prescribed legislation an action prohibited by subsection 488(1). Under subregulation 3.10A(1) of the Regulations, for subparagraph 488(2)(a)(vii) of the Act, Commonwealth, State and Territory legislation specified by the Minister in an instrument in writing is prescribed. Accordingly, the instrument operates to specify Commonwealth, State or Territory legislation, the purposes for which an officer is authorised to access movement records.
4. Similarly, paragraph 488(2)(g) of the Act permits the Minister to authorise a prescribed employee of a prescribed agency to perform an action prohibited by subsection 488(1) for prescribed purposes. Under subregulation 3.10A(2) of the Regulations, for paragraph 488(2)(g) of the Act, an agency of the Commonwealth, a State or a Territory; an employee of a prescribed agency; and a purpose specified in an instrument in writing is prescribed. Accordingly, the instrument also operates to specify agencies, employees and purposes for which movement records can be accessed by prescribed employees of

prescribed agencies of the Commonwealth, or of a State or Territory for prescribed purposes.

5. The instrument repeals LIN 18/068 (F2018L01199) made under regulation 3.10A of the Regulations and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA). Subsection 33(3) of the AIA states that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
6. The purpose of the instrument is to update the information previously contained in LIN 18/068 to ensure all officers, agencies and their employees who require access to movement records for various purposes are authorised to do so. Accordingly, changes have been made to the legislation specified under subregulation 3.10A(1) and the agencies, employees and purposes specified under subregulation 3.10A(2).
7. In the table in Schedule 1 of the instrument:
 - a. the specified Commonwealth, State and Territory legislation are updated to reflect citation changes or to correct typographical errors;
 - b. the following additional Commonwealth legislation are specified:
 - i. *Commonwealth Electoral Act 1918* (Cth);
 - ii. *Office of National Intelligence Act 2018* (Cth); and
 - c. the following additional State and Territory legislation are specified:
 - i. *Care and Protection of Children Act 2007* (NT);
 - ii. *Child and Young People (Safety) Act 2007* (SA);
 - iii. *Child Protection Act 1999* (Qld);
 - iv. *Children and Community Services Act 2004* (WA);
 - v. *Children, Young Persons and Their Families Act* (Tas);
 - vi. *Child, Youth and Families Act 2005* (Vic);
 - vii. *Coroner's Act 1996* (WA);
 - viii. *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
 - ix. *Domestic and Family Violence Act 2007* (NT);
 - x. *Domestic and Family Violence Protection Act 2012* (Qld);

- xi. *Domestic Violence Act 1994* (SA);
- xii. *Duties Act 2008* (WA);
- xiii. *Family Court Act 1997* (WA);
- xiv. *Family Violence Act 2004* (Tas);
- xv. *Family Violence Act 2016* (ACT);
- xvi. *Family Violence Protection Act 2008* (Vic);
- xvii. *Land Tax Assessment Act 2002* (WA);
- xviii. *Payroll Tax Assessment Act 2002* (WA);
- xix. *Restraining Orders Act 1997* (WA);
- xx. *Road Safety Act 1986* (Vic).

8. In the table in Schedule 2 of the instrument:

- a. the names of the following agencies are updated to reflect recent machinery of government change:
 - i. Department of Agriculture, Water and the Environment (formerly known as the Department of Agriculture and Water Resources);
 - ii. Department of Education, Skills and Employment (formerly known as the Department of Education and Training);
 - iii. Services Australia (formerly known as the Department of Human Services);
- b. the following agencies are no longer specified, to ensure that movement records are directly accessed only by agencies who require access in order to perform their functions effectively:
 - i. Department of Defence;
 - ii. Department of Social Services; and
- c. an additional thirteen agencies are specified.

9. Australian Electoral Commission (AEC) and certain employees in the Elections Branch of the AEC are additionally specified. The purpose for which movement records can be accessed by these employees is specified to identify electors who appear to have failed to vote at an election under the *Commonwealth Electoral Act 1918* (Cth).

10. As the conduct or assisting the conduct of security vetting can require access to movement records, additional agencies and purposes are specified. This includes the

Australian Government Security Vetting Agency (AGSVA), the Australian Secret Intelligence Service (ASIS) and the Office of National Intelligence (ONI). The purposes for which the movement records can be accessed are updated for the following agencies, to include assisting authorised vetting agencies to conduct security vetting:

- a. Australian Federal Police (AFP);
 - b. Australian Security Intelligence Organisation (ASIO);
 - c. Department of Foreign Affairs and Trade (DFAT);
 - d. Department of Home Affairs.
11. In addition to assisting agencies in conducting security vetting, the ONI is also specified to ensure employees of ONI have access to the movement records to perform any statutory duties and associated functions under the *Office of National Intelligence Act 2018* (Cth).
12. The Office of State Revenue, Western Australia and Revenue SA, Department of Treasury and Finance (Revenue SA) are additionally specified to facilitate the administration and enforcement of revenue laws. This includes through data matching, determining residency of persons and investigating cases of tax avoidance.
13. Seven additional agencies are specified for the conduct or assisting the conduct of investigations in relation to persons who have been reported as missing. These are:
 - a. New South Wales Police Force (NSW Police Force);
 - b. Northern Territory Police (NT Police Force);
 - c. Queensland Police Service;
 - d. South Australia Police (SA Police);
 - e. Tasmania Police;
 - f. Victoria Police;
 - g. Western Australian Police Force (WA Police Force).
14. Consultation was undertaken in order to determine the legislation under which officers require access to movement records, as well as which employees of which agencies require access and for what purposes, and the best way to facilitate this access. Consultation was undertaken with, but not limited to:
 - a. Commonwealth agencies, including the Australian Electoral Commission, Australian Federal Police, Australian Government Security Vetting Agency,

Australian Secret Intelligence Service, Australian Securities and Investments Commission, Australian Security Intelligence Organisation, Australian Signals Directorate, Australian Taxation Office, Australian Transaction Reports and Analysis Centre, Clean Energy Regulator, Department of Defence, Department of Education, Department of Foreign Affairs and Trade, Department of Health, Fair Work Ombudsman, National Disability Insurance Agency, Office of National Intelligence and Services Australia; and

- b. State and Territory agencies, including New South Wales Police, Northern Territory Police, Queensland Police, South Australian Police, Tasmania Police, Victoria Police, Western Australian Police Force, State Revenue Office South Australia (Revenue SA), Office of State Revenue Queensland Treasury, Office of State Revenue Western Australia, Office of the Health Ombudsman and the Department of Justice Western Australia.
15. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 25665).
 16. The officer (Senior Executive Service, Band One, Border Systems and Programme Management Branch, Strategic Border Command Division) who made the instrument was delegated the powers required to make the instrument in the *Australian Border Force (Minister) Delegations and Authorisations 2018* (ABF (M) No. 1 of 2018), signed on 15 February 2018.
 17. 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 at **Attachment A**.
 18. 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

Migration (LIN 20/033: Access to Movement Records) Instrument 2020

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 *Migration Act 1958* (Migration Act) provides that a person must 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) of the Migration Act. A penalty applies to the performing of an act prohibited by subsection 488(1), unless when authorised in accordance with subsection 488(2).

The term ‘movement records’ means information stored in a notified data base, which the Movements Reconstruction Database (referred to as the Movement Data Base in Gazette Notice 34 dated 31 August 1994) is declared to be pursuant to section 489 of the Migration Act.

The Movement Reconstruction Database contains information kept for the purposes of the Migration Act in relation to the entry into, and departure of persons from, Australia since June 1981. The information 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)(vii)) and where the action is being performed by a prescribed employee of a prescribed agency for a prescribed purpose (subsection 488(2)(g)).

Section 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)* (the Regulations).

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.

Accordingly, this 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).

This instrument also repeals *Migration (LIN 18/068: Access to Movement Records) Instrument 2018*, signed on 24 August 2018 and cited as LIN 18/068.

The key changes in this instrument from LIN 18/068 are:

Schedule 1

Addition of legislation:

1. *Care and Protection of Children Act 2007* (NT);
2. *Child and Young People (Safety) Act 2007* (SA);
3. *Child Protection Act 1999* (Qld);
4. *Child, Youth and Families Act 2005* (Vic);
5. *Children and Community Services Act 2004* (WA);
6. *Children, Young Persons and Their Families Act* (Tas);
7. *Commonwealth Electoral Act 1918* (Cth)
8. *Coroner's Act 1996* (WA);
9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
10. *Domestic and Family Violence Act 2007* (NT);
11. *Domestic and Family Violence Protection Act 2012* (Qld);
12. *Domestic Violence Act 1994* (SA);
13. *Duties Act 2008* (WA)
14. *Family Court Act 1997* (WA);
15. *Family Violence Act 2004* (Tas);
16. *Family Violence Act 2016* (ACT);
17. *Family Violence Protection Act 2008* (Vic);
18. *Land Tax Assessment Act 2002* (WA)
19. *Office of National Intelligence Act 2018* (Cth)
20. *Payroll Tax Assessment Act 2002* (WA)
21. *Restraining Orders Act 1997* (WA);
22. *Road Safety Act 1986* (Vic).

Addition of these Acts will facilitate data sharing with appropriate agencies for the protection of vulnerable people as well as between Home Affairs and the below agencies:

1. The Australian Electoral Commission
2. The Office of State Revenue, Western Australia
3. Office of National Intelligence
4. State Revenue Office, South Australia

Schedule 2

- (1) The names of the following agencies have been updated to reflect recent machinery of government change:
 - (a) Department of Agriculture, Water and the Environment (formerly known as the Department of Agriculture and Water Resources);
 - (b) Department of Education, Skills and Employment (formerly known as the Department of Education and Training); and
 - (c) Services Australia (formerly known as the Department of Human Services).
- (2) The following agencies are no longer specified to ensure that movement records are directly accessed only by agencies who require access in order to perform their functions effectively:
 - (a) Department of Defence;
 - (b) Department of Social Services
- (3) The purposes and employees of several agencies have been updated to reflect changes to agency structures. These changes effectively restrict movement records to specific levels of staff or work areas in specific agencies for specific purposes.
- (4) The following agencies have been added to facilitate access to movement records to enable those agencies to perform their statutory duties and associated functions effectively:
 - (a) Australian Electoral Commission (AEC)
 - (b) Australian Government Security Vetting Agency (AGSVA)
 - (c) Australian Secret Intelligence Service (ASIS)
 - (d) Office of National Intelligence (ONI)
 - (e) The Office of State Revenue, Western Australia
 - (f) Revenue SA, Department of Treasury and Finance (Revenue SA)
 - (g) New South Wales Police Force (NSW Police Force);
 - (h) Northern Territory Police (NT Police Force);
 - (i) Queensland Police Service;
 - (j) South Australia Police (SA Police);
 - (k) Tasmania Police;
 - (l) Victoria Police;
 - (m) Western Australian Police Force (WA Police Force)

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 prohibition against arbitrary or unlawful interference with privacy through the sharing of movement records, 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 as well as to protect the Australian community. In particular, the following additional agencies have been added to the instrument for the following reasons:

- (a) AEC and certain employees in the Elections Branch of the AEC are specified so movement records can be accessed to identify electors who appear to have failed to vote at an election under the *Commonwealth Electoral Act 1918* (Cth);
- (b) AGSVA, ASIS and ONI are specified because the conduct of security vetting may require access to movement records;
- (c) ONI is also specified to ensure employees of ONI have access to the movement records to perform any statutory duties and associated functions under the *Office of National Intelligence Act 2018* (Cth);
- (d) the Office of State Revenue, Western Australia and Revenue SA are specified to facilitate the administration and enforcement of revenue laws, including through data matching, determining residency of persons and investigating cases of tax avoidance;
- (e) the police forces for five states and the NT are specified to enable the assistance in the conduct of investigations in relation to missing persons and to protect vulnerable people.

The further restrictions that the update to the instrument impose ensure that the disclosure of movement records only occurs where it is necessary for persons who have a need to access the information in the exercise of their functions under legislation. In particular, Department of Defence (Defence) is no longer specified in the instrument as they no longer require access for the purpose of assessing, verifying and processing security clearances. Additionally, Defence no longer performs statutory duties for the purpose of *Intelligence Services Act 2001* for which they previously required access. In addition, the Department of Social Services is no longer specified as the relevant staff who required access for the purposes previously specified have transferred to the Department of Home Affairs under machinery of government changes. As such, preventing broad access to movement records and limiting it to those persons and agencies who have a need for the exercise of power is reasonable and proportionate to the legitimate objective of facilitating government and law enforcement agencies in the exercise of their statutory duties and associated functions as well as to protecting the Australian community.

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 under 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. The Migration Act itself imposes a penalty of imprisonment for 2 years to the unlawful access to movement records. Additionally, the instrument itself provides lawful protections in that it restricts the disclosure of the personal information in movement records to officers and employees in particular agencies acting under particular legislation and for purposes specified in the instrument.

Conclusion

To the extent the instrument may limit the prohibition against arbitrary or unlawful interference with privacy, as discussed above, this is necessary in furtherance of a legitimate objective and is proportionate to that objective. This change is compatible with the relevant human rights obligations for the reasons outlined above.

The Hon. Peter Dutton MP
Minister for Home Affairs