

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Migration Regulations 1994

Migration (Digital Passenger Declaration—Circumstances where Passenger Card also required) Instrument (LIN 22/015) 2022

- 1 The instrument, Departmental reference LIN 22/015, is made under subregulation 3.03AB(3) of the *Migration Regulations 1994* (the Regulations).
- 2 The instrument commences on the day after it is registered on the Federal Register of Legislation and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 3 Regulation 3.03AB was recently inserted into the Regulations by the *Home Affairs Legislation Amendment (Digital Passenger Declaration) Regulations 2021* (the DPD Regulations) for the purpose of exempting a person travelling to Australia from completing or providing a passenger card when they have provided a digital passenger declaration to the departmental system that processes digital passenger declarations (DPD) (the **person**).
- 4 Under this provision, the person is not required to complete or provide a passenger card if they have provided a DPD and, before an event referred to in subparagraph 172(1)(a)(iii) or (b)(iii) of the *Migration Act 1958* occurs, the person has not withdrawn their DPD and a clearance officer has not required them to provide a completed passenger card. Under subregulation 3.03AB(2) of the Regulations, a clearance officer may require a person to provide a completed passenger card if circumstances specified in a legislative instrument exist.
- 5 The purpose of the instrument is to specify circumstances, for subregulation 3.03AB(2) of the Regulations, in which a clearance officer may require a person to provide a completed passenger card.
- 6 Ordinarily a person must provide a completed passenger card to be immigration cleared. A person may be exempt from providing a passenger card if they provide a DPD and, among other things, are not required by a clearance officer to provide a passenger card. The instrument, at section 4, specifies two circumstances where a clearance officer may require a person who has provided a DPD to provide a completed passenger card. Requiring a person to provide a passenger card, in either circumstance, ensures they can be immigration cleared.

Consultation

- 7 The Office of Best Practice Regulation (OBPR) was consulted and considered that the instrument dealt with matters of a minor nature and no regulatory impact statement was required. The OBPR reference number is 21-01202.
- 8 No further specific consultation was undertaken for this instrument. This is because the matters implemented by the instrument follow changes made to the Regulations by the DPD Regulations.

Consultation undertaken in relation to the implementation of the DPD generally is set out in the Explanatory Statement for the DPD Regulations.

Details of the instrument

- 9 Section 1 sets out the name of the instrument.
- 10 Section 2 provides for the commencement of the instrument.
- 11 Section 3 sets out the definition of DPD, a term used in the instrument. DPD is defined to mean a digital passenger declaration provided to the departmental system that processes digital passenger declarations. A clearance authority must be able to access the person's DPD on a departmental system.
- 12 Section 4 specifies, for subregulation 3.03AB(2) of the Regulations, that the circumstances mentioned in paragraphs (a) and (b) are circumstances in which a clearance officer may require the person to provide a completed passenger card.
- 13 The circumstance mentioned in paragraph 4(a) is that the person's DPD cannot be accessed by a clearance authority. The meaning of clearance authority includes a clearance officer and a relevant authorised system. This circumstance covers situations where a clearance authority cannot find the person's DPD and therefore cannot access the relevant information needed to immigration clear the person. For example, this provision would apply when:
 - a clearance officer cannot access the person's DPD because of a departmental system outage;
 - an authorised system cannot locate the person's DPD when they present themselves to an authorised system for processing.
- 14 For clarity, even if the person has a physical print out of their completed declaration, if a clearance authority cannot access the DPD on a departmental system a clearance officer may still require them to provide a completed passenger card by way of paragraph 4(a) of the instrument.
- 15 The circumstance mentioned in paragraph 4(b) is that a clearance officer reasonably suspects that the information in the person's DPD is not accurate or complete.
- 16 The effect of this provision is that it is a ground for a clearance officer to request a traveller to provide a completed passenger card if they reasonably suspect the information provided in the DPD is not complete or accurate.
- 17 For example, this could arise in instances such as:
 - the person's DPD contains incorrect flight details, such as where the person does not travel on the original flight they were scheduled to travel to Australia on;
 - the person acknowledges an error, inaccuracy or omission in their DPD to a clearance officer;
 - a clearance officer identifies an inconsistency, such as the passport number in the DPD does not match the passport presented by the person, or the name in the DPD does not match the name on the person's passport; or

- the person needs to make a change to their DPD and cannot access it because they cannot access a mobile device.

- 18 This is similar to the practise that already occurs with passenger cards, where a clearance officer may request a traveller to provide another passenger card if the information is not complete, accurate or illegible, etc.
- 19 For clarity, a clearance officer may require a completed passenger card in either of these circumstances.

Parliamentary scrutiny etc.

- 20 The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in relation to the instrument, and provides that the 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*. The Statement is included at **Attachment A** to this explanatory statement.
- 21 The instrument was made by the Minister for Home Affairs, in accordance with subregulation 3.03AB(3) of the Regulations.

Statement of Compatibility with Human Rights

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

Migration (Digital Passenger Declaration—Circumstances where Passenger Card also required) Instrument (LIN 22/015) 2022

This Disallowable 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

In accordance with requirements outlined in the *Migration Act 1958* (the Migration Act) and the *Migration Regulations 1994* (the Migration Regulations), all travellers arriving into Australia, with some limited exceptions, must provide a completed passenger card on arrival. The passenger card is a paper card that has been used for many decades as part of Australia's border entry requirements. The Australian Border Force (ABF) administers this requirement at airports and ports.

The collection of passenger information for the purposes of the Migration Act is authorised under paragraph 504(1)(c) of the Migration Act. All information provided by travellers is expected to be current and correct (section 102 and paragraph 105(1)(b) of the Migration Act). ABF officers collect passenger cards from travellers upon arrival in Australia.

The information in the passenger card enables travellers, including Australian citizens, to meet immigration clearance requirements under paragraph 166(1)(b) of the Migration Act. The information that can be collected for the purposes of the Migration Act is outlined in regulation 3.01 and regulation 3.02 of the Migration Regulations.

Background

The *Home Affairs Legislation Amendment (Digital Passenger Declaration) Regulations 2021* (the Digital Passenger Declaration Regulations) amended the Migration Regulations to facilitate the use of a digital passenger declaration (DPD) as a voluntary alternative to the passenger card. The Digital Passenger Declaration Regulations support the initial rollout of the DPD, initially on a trial basis, from December 2021.

The Digital Passenger Declaration Regulations amended the Migration Regulations to exempt travellers from providing a completed passenger card, if the traveller provides a DPD, unless:

- the DPD is withdrawn; or
- a clearance officer requires the traveller to provide a passenger card in circumstances specified in a legislative instrument, made under subregulation 3.03AB(3) of the Migration Regulations.

Instrument

The *Migration (Digital Passenger Declaration—Circumstances where Passenger Card also required) Instrument (LIN 22/015) 2022* (the Instrument) provides that a clearance officer may require a person to provide a passenger card in the following circumstances:

- when the person's DPD cannot be accessed by a clearance authority;

- when a clearance officer reasonably suspects that the information in the person's DPD is not accurate or complete.

It is important for the clearance officer to be able to exercise this power because without the information being accessible via the DPD, and without being provided via a passenger card, the traveller has not satisfied one of the requirements to be immigration cleared into Australia.

The circumstances in which a clearance officer could exercise this power include:

- a clearance officer cannot access the person's DPD because of a departmental system outage;
- an authorised system cannot locate the person's DPD when they present themselves to an authorised system for processing; or
- the person acknowledges or the clearance officer notices an error, inaccuracy or omission in the DPD.

Human rights implications

The Instrument engages the following rights:

- Right to equality and non-discrimination – Article 2(1) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD);
- Freedom of movement – Article 12 of the ICCPR and Article 18 of the CRPD;
- Right to privacy – Article 17(1) of the ICCPR;

Right to equality and non-discrimination

Article 2(1) of the ICCPR provides that States undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Article 26 of the ICCPR provides that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Further, the CRPD contains a number of principles, obligations and rights, including Article 5, relating to the non-discriminatory treatment of persons with a disability.

The Instrument specifies circumstances in which a clearance officer may require a person to provide a completed passenger card after having provided a DPD. This does not impose any new conditions that would limit the rights of a person to equality and non-discrimination. Completion of the passenger card is an existing legislative requirement and there are existing mechanisms that make the passenger card more accessible to a range of cohorts, including the passenger card being printed in 13 different languages.

These measures ensure the passenger card is useable by all travellers, regardless of age, ethnicity or disability, and is consistent with the right to equality and non-discrimination.

Right to freedom of movement

Article 12(4) of the ICCPR prohibits the arbitrary deprivation of the right to enter one's own country. Article 18 of the CRPD obliges States to protect the ability of persons with disabilities to exercise their rights relating to freedom of movement on an equal basis with others.

The circumstances specified in the Instrument do not impose any greater or additional restrictions or conditions on the right of persons to enter Australia, including on citizens or others for whom Australia may be their 'own' country. The amendments do not require additional information as a condition of entry; but rather reverts the traveller back to the original mechanism for providing information already required.

Right to freedom from interference with privacy

Article 17(1) of the ICCPR states:

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.

The Instrument does not limit the right to privacy because providing a completed passenger card is already a requirement under the Migration Act. The collection, storage, use, and disclosure of personal information collected by the passenger card by the Department is undertaken in accordance with the Australian Privacy Principles contained in the Privacy Act, and the relevant secrecy and disclosure provisions in the ABF Act and Migration Act, where applicable. The ways in which the ABF and partner border and law enforcement agencies use the information provided by the passenger card is well established in accordance with Australian law.

Conclusion

The Instrument is compatible with human rights, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to ensuring the integrity of border clearance processes.