

EXPLANATORY STATEMENT

Select Legislative Instrument No. 270, 2013

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment (Disclosure of Information) Regulation 2013

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition regulations may be made pursuant to the provisions listed in Attachment A.

The purpose of the Regulation is to amend the *Migration Regulations 1994* ('the Principal Regulations') to authorise the disclosure of information, specifically name, residential address, sex, date of birth and immigration status, of Subclass 050 (Bridging (General)) or Subclass 051 (Bridging (Protection Visa Applicant)) visa holders ('BVE holders') to the Australian Federal Police or the police force or police service of a State or Territory ('the Police'). This disclosure will be authorised by the Minister of Immigration and Border Protection ('the Minister') about individuals or whole classes of such BVE holders.

The Regulation supports and otherwise facilitates the compliance activities of the Department of Immigration and Border Protection ('the Department'). In particular, it is intended to ensure that the Police are able to readily identify if a person charged with a criminal offence is a BVE holder. The provision of name, residential address, date of birth, sex and immigration status will provide the Police with more than one personal identifier to cross-check, ensuring a positive identification. This would facilitate information sharing between the Police and the Department, so that cases that come to the attention of the Police can be referred to the Department so that visa cancellation may be considered, if appropriate.

Details of the Regulation are set out in Attachment C.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the Regulation is compatible with human rights because it advances the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. A copy of the Statement is at Attachment B.

The Office of Best Practice Regulation (OBPR) has been consulted and advises that it considers that the proposed changes have minor impacts on business or the not-for-profit sector. Therefore, any further analysis (in the form of a Regulation Impact Statement) will not be required for this proposal. The OBPR consultation reference is ID 16108.

The Office of the Privacy Commissioner was consulted regarding the disclosure of information about BVE holders to the Police and was invited to provide feedback about the Regulation change, which at the time was still in the drafting stage. The Australian Privacy Commissioner provided feedback and specifically suggested that the Regulation change should clearly describe:

- the kind of personal information that may be disclosed to the Police;
- that the information to be disclosed must only relate to current BVE holders; and
- the purpose for which the information may be disclosed and for which the information may be used or disclosed by the Police.

The Regulations are consistent with these suggestions and this explanatory statement provides further detail.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commence on 14 December 2013.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 116(1) of the Act provides that the Minister may cancel a visa if he or she is satisfied of at least one of a variety of circumstances, including that:
 - the holder has not complied with a condition of a visa;
 - another person required to comply with a condition of the visa has not complied with that condition;
 - the presence of its holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community;
 - that a prescribed ground for cancelling the visa applies to the holder.
- sub-paragraph 2.43(1)(p)(i) of the *Migration Regulations 1994* ('the Principal Regulations') provides that for the purpose of paragraph 116(1)(g) of the Act, in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051(Bridging) (Protection Visa Applicant)) visa, a prescribed ground is that the Minister is satisfied that the visa holder has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country.
- sub-paragraph 2.43(1)(p)(ii) of the Principal Regulations provides that for the purpose of paragraph 116(1)(g) of the Act, a prescribed ground is that in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051(Bridging) (Protection Visa Applicant)) visa the Minister is satisfied that visa holder has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country.
- paragraph 2.43(1)(q) of the Principal Regulations provides that for the purpose of paragraph 116(1)(g) of the Act, a prescribed ground is that in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051(Bridging) (Protection Visa Applicant)) visa an agency responsible for the regulation of law enforcement or security in Australia has advised the Minister that the visa holder is under investigation by that agency and that the visa holder should not hold their visa.

Statement of Compatibility with Human Rights

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

Migration Regulations 1994 – December 2013 – releasing information of Bridging Visa Holders in the community to Australian police services – item 995

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

It is proposed to amend the Migration Regulations 1994 ('the Migration Regulations') to authorise the disclosure of information. The disclosed information, including names, addresses, sex, date of birth and immigration status of Subclass 050 or 051 visa holders (referred to as Bridging E Visa 'BVE' holders hereafter) in the community to the Australian Federal Police or police force or police service of a State or Territory. This disclosure is for the purpose of supporting or otherwise facilitating, the compliance activities of the Department of Immigration and Border Protection (the department). The Australian Government has become increasingly concerned about BVE holders who engage in criminal conduct after being released into the community from immigration detention.

The disclosure of information would help federal, state and territory police services to inform the department, as soon as reasonably practicable, that a BVE holder has been charged with a criminal offence. This will support and facilitate the department's compliance activities, specifically by allowing prompt consideration of visa cancellation. Section 116(1)(g) of the *Migration Act 1958* (the Act) and Regulation 2.43(1)(p) and (q) provide that a BVE may be cancelled if:

- the person has been charged or convicted of a criminal offence in Australia or another country;
- the person is subject to an Interpol notice relating to criminal conduct or a threat to public safety or for the purpose of locating and arresting the person; or
- the head of an Australian law enforcement or a security agency has advised that a Bridging E visa holder is under investigation and should not hold that visa.

Additionally, the proposed amendments assist in the continuation of a cooperative working environment between the department and federal, state and territory police services, enabling information sharing and collaborative work practices.

Human rights implications

This legislative instrument engages human rights related to Privacy; as recognised in article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 17 states:

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

This legislative instrument may be considered to place a limit on the privacy of BVE holders in the community.

The right to privacy as outlined in article 17 of the ICCPR is not absolute and may be limited in the interests of public order. In this instance, the intention of the government in providing personal information relating to BVE holders in the community to federal, state and territory police services is a legitimate policy objective, namely to support existing discretionary cancellation provisions in the Migration Regulations.

Section 189(1) of the Act requires that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen the officer must detain the person. The requirement to detain unlawful non-citizens applies to people whose visa has expired or who have had a visa cancelled or refused, and have become unlawful as a result of not departing Australia. Mandatory detention also applies to any unauthorised arrivals who do not hold a visa, in order to establish health, identity and security risks.

The Minister has personal, non-delegable powers to grant a person in immigration detention a visa. A particular concern is the risk of a person becoming involved in criminal activity after the Minister has personally intervened to release people into the community who would otherwise be in immigration detention. In response, on 29 June 2013, additional discretionary cancellation provisions (Regulations 2.43 (p) and (q)) were introduced. Additionally, a new visa condition (condition 8564) was introduced for people granted BVEs which requires that they do not engage in criminal conduct.

The objective of the proposed Regulation change is to disclose information to relevant federal, state and territory police services to support the compliance work of the department, specifically cancellation of visas where appropriate. The proposed Regulation change is intended to ensure that the police are able to readily identify if a BVE holder has been charged with a criminal offence. The provision of name, residential address, date of birth, sex and immigration status will provide the police with more than one personal identifier to cross check, ensuring a positive identification. This would facilitate information sharing between police services and

the department, so that appropriate cases can be referred to the department for consideration of visa cancellation.

The effect of the proposed Migration Regulation change would be limited to those people holding a BVE, and so would not apply to people on other temporary visas or on permanent visas.

In order to implement the proposed Migration Regulation change, the department intends to put in place formal arrangements through Memoranda of Understanding with federal, state and territory police services to cover the disclosure of the specific information and the Minister's expectations about how they will use it.

Information sharing with police services ensures that information is maintained within a controlled and protected environment with access within the relevant organisations limited to those with a need to know. Standard compliance with information disclosure and storage requirements contained within Commonwealth, State and Territory laws, along with applicable internal governance remain in effect. The Memoranda of Understanding will address privacy and security requirements and the need to limit further dissemination of information not authorised by law.

Under the proposed amendments, disclosures of information made by the department will be consistent with the *Privacy Act 1988*.

The limitation of privacy contained in this legislative instrument is reasonable and lawful and required for federal, state and territory police services to assist and maintain public order. This limitation will support the Department's compliance activities, specifically by allowing prompt consideration of visa cancellation. As such, there is a clear and rational connection between the objective of this legislative instrument and the limitation of the right to privacy.

The department wrote advising the Privacy Commissioner of the intention to make a change to the Migration Regulations regarding the disclosure of information about BVE holders to Federal, State and Territory police and seeking his feedback.

In his written response, the Privacy Commissioner raised a number of issues. These included his recommendation that careful consideration is given to the 'proportionality' of the proposed approach in terms of the potential risks to individuals should their personal information be compromised.

The department considers that the limitation of privacy in the proposed change to the Migration Regulations is in proportion to the policy objective. Immigration detainees may be released on a BVE if they do not pose a risk to the Australian community. There is an expectation that BVE holders do not engage in criminal conduct of any kind while they reside in the community. In cases where it becomes obvious that the BVE holder does become a risk to the community, there is an expectation that the Minister and department act in a timely manner. This expectation is especially heightened when the person has been granted a BVE by the Minister using his personal powers, and in such cases, the grant of a BVE is a privilege and not an entitlement, as the BVE holder has not met the eligibility criteria that would otherwise be required by the migration legislation.

The Privacy Commissioner also commented that where an amendment to the Migration Regulations requires or authorises the department to disclose information to police, that this would be permitted under the current Information Privacy Principle 11.1 of the *Privacy Act 1988*, and will also be permitted under the Australian Privacy Principles when they come into effect on 12 March 2014.

The Privacy Commissioner recommended that the proposed Migration Regulation be drafted narrowly to constrain the use and disclosure of the personal information consistent with the spirit and intent of the *Privacy Act 1988*. He suggested that the Migration Regulations clearly describe the kind of personal information disclosed, that the information is only disclosed about those who hold a BVE, and it specify the purpose for which the information is disclosed. He advised that the authorised use and disclosure of personal information is clearly limited to that necessary to achieve the policy objective of the proposal. Additionally, the Privacy Commissioner raised the risk of using 'identifiers' such as visa numbers and commented on their heightened privacy risks.

The department accepts the advice of the Privacy Commissioner on this issue and have narrowly drafted the proposed Migration Regulation to clearly describe the information that may be disclosed. This information is specified as only name, residential address, sex, date of birth and immigration status. The proposed regulations will only to apply to those who currently hold a BVE, not to those whose BVE has ceased or who have been granted another visa, for instance. There are no 'identifiers' of the kind described as a risk by the Privacy Commissioner in the draft Regulations.

The proposed Migration Regulation also authorises that the information may be disclosed only if the Minister reasonably believes that the disclosure is necessary or appropriate for the performance and exercise of powers under the Migration Act. Disclosing information to identify BVE holders to police forces and police services supports an existing discretionary cancellation provision in the Migration Regulations. Providing information to police about BVE holders ensures that the police will be able to identify if a person who is charged with or convicted of a criminal offence is a BVE holder and will enable the police to inform the department in a timely way.

The Privacy Commissioner also provided feedback on the proposed Memoranda of Understanding with the Federal, State and Territory police to support the operation of the proposed Migration Regulations. He noted that the Memoranda of Understanding provides an opportunity to ensure consistent privacy practices and procedures are implemented by all police services and police forces. In particular, the Memoranda of Understanding should specify that the information is only used for the purposes outlined in the Migration Regulations, clear procedures are established to identify if a person charged with a criminal offence holds a BVE, and that there are clear practices, procedures and systems to ensure the security of the information disclosed.

The department will take into account the recommendations the Privacy Commissioner has made when the Memoranda of Understanding are drafted with relevant police services and police forces. The intention is that these Memoranda of Understanding will set out the procedures to disclose and manage the information

about BVE holders, and with the policy objective of supporting the department's compliance operations.

The department welcomes and accepts the feedback from the Privacy Commissioner and believes that the proposed Migration Regulation change is consistent with the Privacy Act. The limitation of the right outlined in this legislative instrument is reasonable and not arbitrary interference and is at the minimum level required in order for the government policy objective to be achieved and risks to the Australian community to be managed.

Article 9(1) of the ICCPR – prohibition on arbitrary detention

As this legislative instrument supports the Department's compliance activities, specifically by allowing prompt consideration of visa cancellation and, therefore the possible re-detention of the BVE holder, Article 9(1) of the ICCPR is engaged.

Article 9(1) of the ICCPR states that:

- 1. Every person has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

Australia takes its obligations to people in immigration detention very seriously. The Australian Government's position is that the detention of individuals requesting protection is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

In the context of Article 9, detention that is not 'arbitrary' must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

As stated above, a BVE may be cancelled as a result of the information sharing powers introduced by the proposed amendments, in circumstances where grounds for cancellation exist. The objective of this proposal is to ensure the safety of the Australian community and to preserve those rights owed to Australian citizens pursuant to the ICCPR where such rights may be jeopardised by the conduct of a BVE holder.

Conclusion

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

The Hon Scott Morrison MP, Minister for Immigration and Border Protection

ATTACHMENT C

Details of the Migration Amendment (Disclosure of Information) Regulation 2013

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment (Disclosure of Information) Regulation 2013*.

Section 2 – Commencement

This section provides that the Regulation commences on 14 December 2013.

Section 3 – Authority

This section provides that this regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this regulation operate.

Schedule 1 – Amendments

Item [1] – After regulation 5.34E

This item inserts new regulation 5.34F, which authorises the disclosure of information to the Australian Federal Police or the police force or police service of a State or Territory ('the Police'). This Regulation change provides that the disclosure is required or authorised by law, to ensure that such disclosures may be made consistently with the *Privacy Act 1988*. Specifically, this disclosure is consistent with the 'required or authorised by or under law' exception in Information Privacy Principle 11.1 under section 14 of the *Privacy Act 1988*. From 12 March 2014, the disclosure will be consistent with Australian Privacy Principle 6.2(b), where 'the use or disclosure of the information is required or authorised by or under an Australian law or a court/Tribunal order'.

The purpose of the Regulation is to amend the *Migration Regulations 1994* ('the Principal Regulations') to authorise the disclosure of information, specifically name, residential address, sex, date of birth and immigration status, of Subclass 050 (Bridging (General)) or Subclass 051 (Bridging (Protection Visa Applicant)) visa holders ('BVE holders'). This disclosure may be authorised by the Minister.

The objective of the Regulation change to release information to relevant police forces or police services, is to enable the Department to monitor visa holder compliance with the visa holder's conditions. The Regulation is intended to ensure that the Police are able to readily identify if a person charged with a criminal offence, or who is under investigation for a criminal offence, is a BVE holder. The provision of name, residential address, date of birth, sex and immigration status will provide the Police with more than one personal identifier to cross-check, ensuring a positive identification. This will facilitate information sharing between the Police and the Department of Immigration and Border Protection ('the Department'), so that cases that come to the attention of the Police can be referred to the Department for visa cancellation to be considered, if appropriate.

Proposed subregulation 5.34F(1)

New subregulation 5.34F(1) provides that the Regulation applies in relation to a person who holds, or a class of persons who hold either a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa ('BVE holder').

The purpose of this subregulation is to specify what person or group of people are covered by the proposed Regulation. The information to be disclosed will only relate to individuals currently holding a BVE. If a person ceases to be a BVE holder then the Minister cannot authorise the disclosure of their information under the proposed Regulation. In the situation where such a person again becomes a BVE holder, the Minister may authorise the disclosure of that person's information.

It is intended that the Minister, or the Minister's delegate, may authorise the disclosure of information about:

- a person who holds a Subclass 050 (Bridging (General)) or Subclass 051 (Bridging (Protection Visa Applicant)) visa ('BVE holder'); or
- a class of persons within the BVE holder group; or
- all BVE holders.

Proposed subregulation 5.34F(2)

New subregulation 5.34F(2) provides that the Minister may authorise the disclosure of any information mentioned in subregulation 5.34F(4) about the person or a class of persons to the Police.

The purpose of this subregulation is to specify that the disclosure can only be authorised to be made to:

- the Australian Federal Police; or
- the police force or police service of a State or Territory.

'Class' is included to ensure that, in the disclosure authorisation, there is no need to individually name the BVE holders. Describing a 'class' in the authorisation would be sufficient.

Proposed subregulation 5.34F(3)

New subregulation 5.34F(3) provides that the Minister may authorise the disclosure only if the Minister reasonably believes the disclosure is necessary or appropriate for the performance of functions or the exercise of powers under the Act.

The purpose of this subregulation is to specify the circumstances where the Minister may exercise his or her discretion to authorise the disclosure.

Proposed subregulation 5.34F(4)

New subregulation 5.34F(4) provides that, for subregulation 5.34F(2), the information that may be disclosed is one or more of the following:

- (a) the name of the person or the names of persons in the class;
- (b) the residential address of the person or the residential addresses of persons in the class;
- (c) the sex of the person or of persons in the class;
- (d) the date of birth of the person or the dates of birth of persons in the class;
- (e) the immigration status of the person or of persons in the class.

There is no set form of disclosure. One or more pieces of information listed in subregulation 5.34F(4) could be disclosed together, depending on the circumstances. The information disclosed could relate to an individual BVE holder or a class of BVE holders.