EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 4

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulations 2012 (No. 1)

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 of the Act in Attachment A.

The purpose of the Regulations is to amend the *Migration Regulations 1994* (the Principal Regulations) to create specific criteria for the refusal to grant or the cancellation of a visa in most circumstances where the Foreign Minister has declared a person under the *Autonomous Sanctions Regulations 2011* (the Autonomous Sanctions Regulations) and has not waived the operation of the declaration. A declaration could be made for the purposes of preventing the person from travelling to, entering or remaining in Australia.

In particular, the Regulations amend the Principal Regulations to:

- provide an additional ground for cancelling a visa, other than certain visas, in circumstances where the visa holder:
    - is declared under the Autonomous Sanctions Regulations for the purpose of preventing the person from travelling to, entering or remaining in Australia; and
    - is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with the Autonomous Sanctions Regulations; and
- provide as a criterion for the grant of a visa that the applicant:
    - is not declared under the Autonomous Sanctions Regulations for the purpose of preventing the person from travelling to, entering or remaining in Australia; or
    - if the applicant is declared - is a person for whom the Foreign Minister has waived the operation of the declaration in accordance with the Autonomous Sanctions Regulations.

Details of the Regulations are set out in Attachment B.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by Schedule 1 to the Regulations and advises that the regulations are not likely to have direct effect, or substantial indirect effect, on business and are not likely to restrict competition. The OBPR consultation reference is 12489.

A Statement of Compatibility with Human Rights has been completed in relation to the amendments made by Schedule 1 to the Regulations and assesses that the regulations are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment C.

The Department of Foreign Affairs and Trade has also been consulted in relation to the making of the Regulations as the amendments made by Schedule 1 to the Regulations implement travel sanctions made under the Autonomous Sanctions Regulations.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT A

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 5(1) of the Act, which provides that "prescribed" means prescribed by the regulations;

- subsection 31(3) of the Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by sections 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A);

- subsection 40(1) of the Act, which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;

- section 65 of the Act, which provides for the Minister to grant or refuse a visa. In particular:

    - subparagraph 65(1)(a)(ii) of the Act, which provides that after considering a valid application for a visa, the Minister is to grant the visa, if satisfied that the criteria for it prescribed by the Act or the Principal Regulations have been satisfied;

- paragraph 116(1)(g) of the Act, which provides that the regulations may prescribe grounds for cancellation of a visa under section 116;

- subsection 116(3) of the Act, which provides that the Minister must cancel a visa if there are prescribed circumstances in which a visa must be cancelled;

- section 505 of the Act, which provides that to avoid doubt, regulations for the purpose of prescribing a criterion for visas of a class may provide that the Minister, when required to decide whether an applicant for a visa of the class satisfies the criterion:

    – is to get a specified person or organisation, or a person or organisation in a specified class, to give an opinion on a specified matter; make an assessment of a specified matter; make a finding about a specified matter; or make a decision about a specified matter; and

    – is to have regard to that opinion, assessment, finding or decision in (or to take that opinion, assessment, finding or decision to be correct for the purposes of) deciding whether the applicant satisfies the criterion.

ATTACHMENT B

Details of the *Migration Amendment Regulations 2012 (No. 1)*

Regulation 1 – Name of Regulations

Regulation 1 provides that the title of the Regulations is the *Migration Amendment Regulations 2012 (No. 1)* (the Regulations).

Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Migration Regulations 1994*

Subregulation 3(1) provides that Schedule 1 amends the *Migration Regulations 1994* (the Principal Regulations).

Subregulation 3(2) provides that the amendments made by items [1] and [2] of Schedule 1 applies in relation to a visa that is in effect on the day on which the Regulations commence and to a visa granted on or after that day.

Subregulation 3(3) provides that the amendment made by item [3] of Schedule 1 applies in relation to an application for a visa made on or after the day on which the Regulations commence.

Schedule 1 – Amendments

Item [1] - After paragraph 2.43(1)(a)

This item inserts new paragraph 2.43(1)(aa) after paragraph 2.43(1)(a) in Subdivision 2.9.2 of Division 2.9 of Part 2 of the Principal Regulations.

Section 116 in Subdivision D of Division 3 of Part 2 of the *Migration Act 1958* (the Act) sets out the general grounds on which the Minister may cancel a visa. Paragraph 116(1)(g) of the Act provides that the Minister may cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa applies to the holder. Subregulation 2.43(1) prescribes the grounds for cancelling a visa under paragraph 116(1)(g) of the Act.

New paragraph 2.43(1)(aa) provides that for the purposes of paragraph 116(1)(g) of the Act, a prescribed ground is, in the case of a person who is the holder of a visa other than a relevant visa, the person:

- is declared under paragraph 6(1)(b) or (2)(b) of the *Autonomous Sanctions Regulations 2011* (the Autonomous Sanctions Regulations) for the purpose of preventing the person from travelling to, entering or remaining in Australia; and

- is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations.

The prescribed grounds in new paragraph 2.43(1)(aa) does not apply to "relevant visas". Subregulation 2.43(3) provides that a "relevant visa" means any of the following subclasses:

- Subclass 050 (Bridging (General)) visa;
- Subclass 200 (Refugee) visa;
- Subclass 201 (In-Country Special Humanitarian) visa;
- Subclass 202 (Global Special Humanitarian) visa;
- Subclass 203 (Emergency Rescue) visa;
- Subclass 204 (Woman at risk) visa;
- Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa;
- Subclass 449 (Humanitarian Stay (Temporary)) visa;
- Subclass 451 (Secondary Movement Relocation (Temporary)) visa;
- Subclass 785 (Temporary Protection) visa;
- Subclass 786; (Temporary (Humanitarian Concern)) visa; and
- Subclass 866 (Protection) visa.

Paragraph 10(1)(a) of the *Autonomous Sanctions Act 2011* (the Autonomous Sanctions Act) provides that the regulations may make provisions relating to proscription of persons or entities (for specified purposes or more generally).

Paragraph 6(1)(b) of the Autonomous Sanctions Regulations provides that for paragraph 10(1)(a) of the Autonomous Sanctions Act, the Foreign Minister may, by legislative instrument, declare a person mentioned in an item of the table in regulation 6 for the purpose of preventing the person from travelling to, entering or remaining in Australia.

Paragraph 6(2)(b) of the Autonomous Sanctions Regulations provides that for paragraph 10(1)(a) of the Autonomous Sanctions Act, the Foreign Minister may, by legislative instrument, declare a person for the purpose of preventing the person from travelling to, entering or remaining in Australia if the Foreign Minister is satisfied that the person is contributing to the proliferation of weapons of mass destruction.

Broadly, regulation 19 of the Autonomous Sanctions Regulations provides that the Foreign Minister may waive, in writing, and only on grounds that it would be in the national interest or on humanitarian grounds, the operation of the declaration, for a visa

holder who is a person declared under paragraph 6(1)(b) or (2)(b), to the extent that it would have the effect of preventing the person from travelling to, entering or remaining in Australia as would be permitted by the visa.

The purpose of the amendment is to ensure that a visa, other than a relevant visa, can be cancelled if the visa holder is a person declared under paragraph 6(1)(b) or (2)(b) of the Autonomous Sanctions Regulations, and is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations. This outcome is consistent with the purpose of the Foreign Minister's declaration, which is to prevent the declared person from travelling to, entering, or remaining in Australia.

However, if the visa holder is a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations, the effect is that the visa will not be cancelled.

Item [2] – Subparagraph 2.43(2)(a)(ii)

This item substitutes subparagraph 2.43(2)(a)(ii) and insert new subparagraphs 2.43(2)(a)(ii) and 2.43(2)(iii) in Subdivision 2.9.2 of Division 2.9 of Part 2 of the Principal Regulations.

Paragraph 116(1)(g) of the Act provides that the Minister may cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa applies to the holder. Subregulation 2.43(1) prescribes the grounds for cancelling a visa under paragraph 116(1)(g) of the Act.

Subsection 116(3) of the Act provides that if a Minister may cancel a visa under subsection 116(1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled. Subregulation 2.43(2) prescribes the circumstances in which the Minister must cancel a visa for the purposes of subsection 116(3) of the Act.

Substituted subparagraph 2.43(2)(a)(ii) provides that the circumstance comprising the grounds in new paragraph 2.43(1)(aa), inserted by item 1 above, as a circumstance in which the Minister must cancel a visa.

The effect of the amendment is that a visa, other than a relevant visa, must be cancelled if the visa holder is a person declared under paragraph 6(1)(b) or (2)(b) of the Autonomous Sanctions Regulations, and is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations. This outcome is consistent with the purpose of the Foreign Minister's declaration, which is to prevent the declared person from travelling to, entering, or remaining in Australia.

The amendment retains the current circumstance in which the Minister must cancel a visa provided in paragraph 2.43(1)(b), in new subparagraph 2.43(2)(a)(iii).

Item [3] - Schedule 4, item 4003

This item substitutes item 4003 in Schedule 4 to the Principal Regulations.

Public interest criteria (PIC) 4003 is a commonly prescribed time of decision criterion in Schedule 2 to the Principal Regulations that applies to the majority of visa subclasses. Currently, PIC 4003 provides that the applicant is not determined by the Foreign Minister, or a person authorised by the Foreign Minster, to be a person whose presence in Australia:

- is or would be contrary to Australia's foreign interests; or
- may be directly or indirectly associated with the proliferation of weapons of mass destruction.

New paragraph 4003(a) mirrors current paragraph 4003(a) and provides that the applicant:

- is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests.

New paragraph 4003(b) mirrors current paragraph 4003(b) and provides that the applicant:

- is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.

New paragraph 4003(c) provides that the applicant, either:

- is not declared under paragraph 6(1)(b) or (2)(b) of the Autonomous Sanctions Regulations for the purpose of preventing the person from travelling to, entering or remaining in Australia; or
- if the applicant is declared – is a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations.

Paragraph 10(1)(a) of the Autonomous Sanctions Act provides that the regulations may make provision relating to proscription of persons or entities (for specified purposes or more generally).

Paragraph 6(1)(b) of the Autonomous Sanctions Regulations provides that for paragraph 10(1)(a) of the Autonomous Sanctions Act, the Foreign Minister may, by legislative instrument, declare a person mentioned in an item of the table in regulation 6 for the purpose of preventing the person from travelling to, entering or remaining in Australia.

Paragraph 6(2)(b) of the Autonomous Sanctions Regulations provides that for paragraph 10(1)(a) of the Autonomous Sanctions Act, the Foreign Minister may, by legislative instrument, declare a person for the purpose of preventing the person from

travelling to, entering or remaining in Australia if the Foreign Minister is satisfied that the person is contributing to the proliferation of weapons of mass destruction.

Broadly, regulation 19 of the Autonomous Sanctions Regulations provides that the Foreign Minister may waive, in writing, and only on grounds that it would be in the national interest or on humanitarian grounds, the operation of the declaration, for a visa applicant who is a person declared under paragraph 6(1)(b) or (2)(b), to the extent that it would have the effect of preventing the person from travelling to, entering or remaining in Australia as would be permitted by the visa.

The purpose of the amendment is to ensure that a visa applicant fails to satisfy PIC 4003, and would be refused a visa, if the visa applicant is a person declared under paragraph 6(1)(b) or (2)(b) of the Autonomous Sanctions Regulations, and is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations. This outcome is consistent with the purpose of the Foreign Minister's declaration, which is to prevent the declared person from travelling to, entering, or remaining in Australia.

However, if the visa applicant is a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations, the effect is that the visa applicant will satisfy PIC 4003. The visa applicant is still required to satisfy all other criteria for the grant of the visa.

The amendments retains the current requirements that an applicant for a visa is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests or may be directly or indirectly associated with the proliferation of weapons of mass destruction, in substituted paragraphs 4003(a) and (b).

ATTACHMENT C

Statement of Compatibility with Human Rights

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

Amendments to the *Migration Regulations 1994*

The amendments to the *Migration Regulations 1994* are 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

The amendments to the *Migration Regulations 1994* are intended to give effect to the travel sanctions element of reforms to Australia's autonomous sanctions legislative regime implemented by the *Autonomous Sanctions Act 2011* and the *Autonomous Sanctions Regulations 2011*. The Minister for Foreign Affairs is responsible for Australia's autonomous sanctions regime. The purpose of the new legislative framework is to allow greater flexibility in the range of punitive measures Australia can apply as a response to situations of international concern, such as the proliferation of weapons of mass destruction, the grave repression of human rights or armed conflict.

The proposed amendments to the Migration Regulations – the addition of Regulation 2.43(1)(aa) and Public Interest Criterion (PIC) 4003 (c) – will create specific criteria for refusing to grant an application for a visa and grounds for cancelling a visa, subject to certain limitations, where the Foreign Minister imposes a travel sanction under the autonomous sanctions regime. This is in order to prevent a person declared as being subject to Autonomous Sanctions from travelling to, entering or remaining in Australia. Currently the Foreign Minister may determine that a person's presence in Australia is, or would be contrary, to Australia's foreign policy interests and a visa can be refused or cancelled on this basis. The new autonomous sanctions regime provides a clearer and more comprehensive legislative framework for imposing travel sanctions.

Human rights implications

The human rights obligations that may possibly be affected by the amendments to the *Migration Regulations 1994* are:

- Equality and non-discrimination (Article 26 of the ICCPR)
- Freedom of movement (Article 12 of the ICCPR)
- Expulsion of aliens, including potential *non-refoulement* issues (Articles 6, 7 and 13 of the ICCPR; Article 3 of the CAT).
- Family unity and best interests of children (Article 17 and 23 of the ICCPR, Article 3 of the CRC).

The amendments relate to the Foreign Minister's power to regulate the ability of a person to travel to, enter or remain in Australia as a reaction to situations of international concern. Situations of international concern are related to national

security interests which are permissible grounds for limiting non-absolute and derogable human rights.

To the extent that the travel sanctions relate to a non-citizen outside Australia applying for a visa to enter Australia, Australia's human rights obligations are not engaged as such a person is outside Australia's jurisdiction. In particular, the right to freedom of movement (ICCPR Article 12) does not provide a right for non-citizens to enter a country of which they are not a national.

In terms of non-discrimination, persons who are declared by the Foreign Minister will be treated differently to persons who are not. This differentiation in treatment does not constitute unlawful discrimination as it is a reasonable and proportionate response aimed at punishing persons closely associated with regimes which are involved in the proliferation of weapons of mass destruction, grave human rights breaches and unlawful armed conflict.

The consequence for a non-citizen in Australia whose visa application is refused, or whose visa is cancelled, because they have been declared by the Foreign Minister, is that they must leave Australia if they do not obtain another visa to remain, or be removed.

The amendments have a clear legal basis and contain sufficient flexibility to manage each case on an individual basis. A person can apply to the Foreign Minister to have the declaration revoked. The Foreign Minister may also waive, for national interest or humanitarian reasons, the operation of the declaration, meaning it is not a bar to visa grant or a ground for cancellation. The decisions of the Foreign Minister are subject to judicial review and the regime therefore complies with Australia's obligations about the expulsion of non-citizens who are lawfully in Australia (Article 13 of ICCPR).

In addition, not all visa types can be refused or cancelled on the basis of the Foreign Minister's declaration – in particular, Protection Visas are not subject to refusal or cancellation under this regime. Therefore a person who is in Australia, who is refused a visa or whose visa is cancelled on the basis of being declared under the autonomous sanctions regime and who fears harm as a consequence of removal from Australia will still be able to apply for a Protection Visa. This process, together with the Foreign Minister's powers to revoke a declaration or waive its operation, will allow Australia's *non-refoulement* obligations to be met if they are engaged as well as allow consideration of other human rights obligations, including those in relation to family unity and children.

Conclusion

The Amendments to the *Migrations Regulations 1994* are compatible with human rights because those limitations that arise are reasonable, necessary and proportionate measures which enable Australia to maintain its foreign policy and national security interests and because the autonomous sanctions regime as a whole allows for the consideration of human rights obligations if they arise in individual cases.

Chris Bowen, Minister for Immigration and Citizenship