

EXPLANATORY STATEMENT

Select Legislative Instrument No. 269, 2013

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment (Bridging Visas—Code of Behaviour) 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 of the Act in Attachment A.

The purpose of the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013* ('the Amendment Regulation') is to amend the *Migration Regulations 1994* ('the Principal Regulations') to establish an enforceable code of behaviour for Bridging E (Class WE) visa ('BVE') holders.

In particular the Amendment Regulation creates a Public Interest Criterion ('PIC') that requires certain applicants for a BVE to sign a code of behaviour to be eligible for the grant of the BVE. The PIC applies to applicants for BVEs who are over 18 and hold, or previously held, a BVE granted by the Minister under section 195A of the Act.

Where the BVE holder has signed a code of behaviour, the Amendment Regulation also creates a visa condition that requires the holder to abide by the code of behaviour that they have signed.

The code of behaviour is specified by the Minister in an instrument in writing.

Finally, the Amendment Regulation prevents a person whose BVE has been cancelled due to criminal conduct or a breach of the code of behaviour from applying for a further BVE. The Amendment Regulation also prevents a person who previously held a visa that has been cancelled on a ground specified in paragraph 2.43(1)(p) or (q) from applying for a further BVE. Broadly, paragraphs 2.43(1)(p) and (q) provide grounds to cancel BVEs held by persons who:

- are convicted of, or charged with, an offence in Australia or another country; or
- are the subject of an Interpol notice relating to criminal conduct or public safety threats; or
- are under investigation by an agency responsible for the regulation of law enforcement or security.

The introduction of a code of behaviour will make persons who receive a visa due to an exercise of the Minister's power under section 195A of the Act more accountable for their actions.

A Statement of Compatibility with Human Rights has been completed for the Amendment 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, to the extent that it may limit human rights, the Government considers those limitations are reasonable, necessary and proportionate. A copy of the Statement is at Attachment B.

Details of the Amendment Regulation are set out in Attachment C.

The Office of Best Practice Regulation ('OBPR') in the Department of Finance has been consulted on the Amendment Regulation. The OBPR advised that the amendments do not have a regulatory impact on business or the not-for-profit sector and a Regulation Impact Statement is not required. OBPR consultation reference is 16239.

The regulation changes relate to the immigration status of a non-citizen who holds or has held a BVE granted by the Minister under section 195A of the Act. The changes are considered to be of a machinery nature as they add to the existing cancellation framework under the migration legislation. The changes also do not impact on other agencies and, therefore, there has not been external consultation on these regulation changes. There is continuing consultation on the draft code of behaviour, which would be incorporated into a legislative instrument specified by the Amendment Regulation, with relevant external agencies.

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

The Amendment Regulation commences on 14 December 2013.

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 31(3), which provides that 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 section 32, 36, 37, 37A or 38B but not section 33, 34, 35, 38 or 38A);
- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 41(1), which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- subsection 41(3), which provides that, in addition to any conditions specified under subsection 41(1), the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purposes of this subsection;
- subsection 45(1), which provides that, subject to the Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class;
- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application; and
- Subsection 46(4), which provides that, without limiting subsection 46(3), the Regulations may also prescribe:
 - the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - how an application for a visa of a specified class must be made; and
 - where an application for a visa of a specified class must be made; and
 - where an applicant must be when an application for a visa of a specified class is made.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013

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

The Government has become increasingly concerned about non-citizens who engage in conduct that is not in line with the expectations of the Australian community. The Australian community expects that non-citizens being released into the community on Bridging E (Class WE) visas (BVE) while they wait for their claims for protection to be assessed, follow the laws and values considered important in Australian society.

There is limited ability to cancel the BVE of persons who hold or have had a BVE granted under section 195A where they have engaged in behaviour not considered acceptable by the Australian community, that is, unless the behaviour falls within the scope of existing cancellations powers within sections 116 or 501 of the *Migration Act 1958* (the Act). There is also limited ability to prevent persons who have had their BVE cancelled under section 116(1)(b) or section 116(1)(g) from applying for a further BVE, including an ‘associated’ BVE application.

It is intended by these amendments that persons who hold or have held a BVE granted under section 195A will be required to sign a Code of Behaviour (the Code) before a further BVE will be granted to them. Failure to comply with this Code will enliven consideration of BVE cancellation. The details of the amendments are set out further below. The Code is a document which outlines what the signatory must and must not do whilst living in the community on a BVE. The holder must not: disobey any Australian laws; make sexual contact with another person without that person’s consent, regardless of their age; get involved in any kind of criminal behaviour including violence towards any person; give false identity documents; harass, intimidate or bully any other person or group of people; engage in anti-social or disruptive behaviour; refuse to comply with any health undertaking or direction. The holder must: cooperate with the department regarding the resolution of their status; present themselves to the department when required; and cooperate with the provision or application of identity documents.

The identified outcomes for persons who hold or have held a BVE granted under section 195A, who are being considered for, or granted, a further BVE following the introduction of the new Regulation amendments that engage human rights instruments are:

- Continued detention of a person under section 189 due to not being granted a visa because a non-citizen fails to sign the Code.
- Separation of the family unit where a family member refuses to sign the Code and remains in detention, whilst other family members sign the Code, or are under 18 years of age, and are granted BVEs.
- Re-detention of a person under section 189 following cancellation of their BVE for a breach of the Code.
- Separation of the family unit where a family member breaches the Code and is re-detained, whilst other family unit members continue to hold BVEs.

The changes involve 6 amendments to the *Migration Regulations 1994* (the Regulations). The first is to prevent certain persons who have had a BVE cancelled under either section 116(1)(b) or section 116(1)(g) from applying for a further BVE. The next two are to amend the existing BVE regulations to require certain BVE applicants to satisfy a new Public Interest Criterion (PIC) and that persons who have signed the Code are subject to a new mandatory visa condition. The fourth amendment is to create the new PIC requiring certain BVE applicants to sign the Code before the BVE can be considered for grant. The fifth amendment provides that the Code of Behaviour will be a Legislative Instrument under Part 4 of the Regulations. The sixth amendment is to create a new mandatory visa condition requiring BVE holders who have signed the Code to abide by the Code. A breach of this condition enlivens the existing cancellation provisions in section 116(1)(b).

The first amendment creates a visa application bar for any person seeking to apply for a further BVE where a previously held BVE was cancelled under section 116(1)(b) or section 116(1)(g). This involves an additional clause being inserted into Schedule 1 – Classes of visa\Part 3 – Bridging visas\Item 1305 Bridging E (Class WE). The effect of this change would be the affected person being unable to validly apply for a further BVE, resulting in continued detention under section 189 unless the Minister grants a visa under s195A, or the person is eligible to apply for and be granted a visa of another kind.

The second amendment is to change the Regulations to require people being considered for grant of a BVE who hold, or have previously held, a BVE that was granted to them by the Minister under section 195A to satisfy a new PIC.

The third amendment is to change the Regulations to require a mandatory visa condition be imposed on BVEs that are granted to persons who have been required to sign the Code as part of the visa decision process. This amendment involves inserting the new visa condition into Subclass 050 - Bridging (General) regulations as a new clause.

The fourth amendment involves creating the new PIC in Schedule 4 – Public Interest Criteria and related provisions. This change could result in the continued detention, or re-detention, of a person if the person refuses to sign the Code.

The fifth amendment involves providing that the Code will be a Legislative Instrument under Part 4 of the Regulations.

The sixth amendment involves creating a new visa condition in Schedule 8 – Visa conditions. Where a BVE holder breaches the condition attached to their BVE they would be considered for discretionary cancellation under section 116(1)(b). Such a decision could be made by the Minister personally or the delegate in accordance with written policy. In the event the BVE is cancelled, this would result in re-detention under section 189.

Human rights implications

The outcome of these amendments could result in the:

- continued detention of a person under section 189
- re-detention of a person under section 189
- possible separation of the family unit

The three identified outcomes on the affected cohort will be assessed against the following list of relevant human rights articles that have been identified as potentially being engaged:

- Right to equality and non-discrimination
- Right to freedom of opinion and expression
- Right to the presumption of innocence
- Right to freedom of movement
- Right to security of the person and freedom from arbitrary detention
- Right to respect for the family and children
- Non-refoulement
- The right to social security
- The right to an adequate standard of living

Right to equality and non-discrimination

The right to equality and non-discrimination is contained in articles 2 and 26 of *the International Covenant on Civil and Political Rights (ICCPR)*:

Article 2

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, 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.'

These amendments are aimed at persons who hold or have held a BVE granted under section 195A who: since been granted a BVE under section 195A; are being considered for a further BVE either under section 195A or through the regular process; or, are being considered for the first time for a BVE under section 195A. These amendments do not extend to other non-citizens who have obtained a BVE through other means (except in the case of the new decision bar), or are seeking a BVE through means such as: applying for a BVE on departure grounds; or for those with ongoing litigation; those with active requests for Ministerial intervention under sections of the Act such as section 351 and section 417; or those who have lodged a substantive visa application, such as a Combined Partner visa application, and who may have been in the community prior to application lodgement as an unlawful non-citizen for a substantial period of time.

These amendments engage articles 2 and 26 of the ICCPR. Under General Comment 18, the UN Human Rights Committee stated:

'the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'

The object of the Migration Act is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. In that sense the purpose of the Migration Act is to differentiate on the basis of nationality between non-citizens and citizens. The UN Human Rights Committee has recognised in the ICCPR context that "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment" (CCPR General Comment 15, 11 April 1986).

Australia's migration framework states that unlawful non-citizens (i.e. non-citizens who do not hold a valid visa) will be subject to mandatory detention. Legislative amendments that contemplate cancellation of a visa and subsequent detention add to a number of existing laws that are well-established, generally applicable and predictable. This will be the case also for these amendments. Further, the amendments present a reasonable response to achieving a legitimate purpose under the Covenant – the safety of the Australian community. Any questions of proportionality will be resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a BVE.

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 conduct contrary to the public interest. In cases where it becomes obvious that the BVE holder does pose 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 government is of the view that these amendments are proportionate to achieving its stated purpose.

Right to freedom of opinion and expression

The right to freedom of opinion and expression is contained in article 19 of the ICCPR.

Article 19.

1. Everyone shall have the right to hold opinions without interference.

The Code states that BVE holders must not:

- *get involved in any kind of criminal behaviour in Australia, including violence against any person; or*
- *harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other citizens and residents.*

The Code is not written in such a way as to regulate the BVE holder's ability to express certain views. It does, however, identify that certain types of behaviour could be viewed as harassment, intimidation or a form of bullying of other persons or groups of persons and are not considered to be tolerable in the Australian society, and therefore could be seen as a breach of the Code. Such a breach would enliven the discretion to cancel the BVE under section 116, either by the Minister personally or by a delegate.

Under the *ICCPR* this human right may have an 'express limitation' for the purposes of national security, public order, public safety, public morals and the protection of the human rights of others. Therefore, the wording in the Code is not considered to limit this human right, and in fact is worded to limit the person's ability to adversely impact on public order, public safety, public morals and the protection of the human rights of others.

Therefore, the wording in the Code does not engage article 19 of the *ICCPR*.

The right to the presumption of innocence

Article 14(2) of the *ICCPR* states that:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

This legislative instrument specifically allows for the continued detention of a person under section 189 or the visa cancellation on the basis that the BVE holder did not comply with the Code. Article 14(2) of the *ICCPR* may be engaged.

The Human Rights Committee has stated the following in relation to Article 14(2) of the ICCPR:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

It may be viewed that this Regulation change engages and limits the presumption of innocence expressed in Article 14(2) insofar as the amendment predicates an administrative decision by a public authority (the department) on a criminal charge or conduct without resolution of that charge before the courts.

This Regulation change will be lawful by virtue of the legislative amendment and is both reasonable and proportionate to the objective of supporting the code of behaviour and condition 8564; which was implemented in June 2013 to protect the Australian public. While the Code or condition 8564 capture a wide range of criminal offences or general conduct, there is still discretion *not* to cancel a BVE holder. The discretion to not cancel may be used, for example, should there be grounds to consider that charge has been improperly brought by the state. Further, the decision to cancel will be based on the individual merits of a client's case, including the severity of the offence or conduct. There may be compelling grounds to not cancel a BVE. In addition, the Minister can use section 195A to grant a BVE to a person if charges are subsequently dropped or discontinued post visa cancellation.

As such, the amendments engage Article 14 of the ICCPR, however the government is of the view that these amendments are proportionate to achieving its stated purpose.

Right to freedom of movement

The right to freedom of movement is contained in article 12 of the ICCPR.

'Article 12

- 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
- 2. Everyone shall be free to leave any country, including his own.*
- 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
- 4. No one shall be arbitrarily deprived of the right to enter his own country.*

Freedom of movement relates to the right to move freely *within a country* for those *who are lawfully within a country*, the right to leave any country and the right to enter a country *of which you are a citizen*. In the case where a person is either kept in immigration detention because they refuse to sign the Code, or they are re-detained following a breach of the Code

and subsequent visa cancellation, the result may be that their right to freedom of movement may be limited. This right has been limited by a legitimate objective and which is proportionate and its rationale has been detailed in the government's response to the right to equality and non-discrimination.

These amendments limit article 12, however the government is of the view that these amendments are proportionate to achieving its stated purpose and in a manner that is proportionate and consistent with 12(3) of the ICCPR.

Right to security of the person and freedom from arbitrary detention

The right to security of the person and freedom from arbitrary detention is contained in article 9 of the ICCPR.

'Article 9

- 1. Everyone 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.*
- 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
- 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
- 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
- 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'*

The amendments have the potential to engage article 9 of the ICCPR as they may:

- *permit a public authority to detain a person (including arbitrary detention), including in immigration detention facilities.*

Australia takes its obligations to people in detention very seriously. The Australian Government's position is that the immigration detention of non-citizens who do not hold a visa 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, ‘arbitrary’ means that detention 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.

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. The discretionary nature of the cancellation allows individual circumstances to be taken into account. Comprehensive policy guidance will be provided to decision-makers to ensure that the discretion is exercised in a reasonable and proportionate matter. For example, less serious breaches may result in the person being warned about possible consequences for further breaches of the Code, in the first instance. Additional safety mechanisms in relation to the use of this discretion are that a BVE holder who has been cancelled will have access to both merits and judicial review.

As such, the amendments do not offend Article 9 of the ICCPR

Right to respect for the family and children

The right to respect for the family is contained in articles 3 of the CRC and 23, 24 and 17(1) of the ICCPR.

‘Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

‘Article 17

1. 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 23

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*
- 3. No marriage shall be entered into without the free and full consent of the intending spouses.*
- 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.’*

‘Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State

Where a person is either kept in immigration detention because they refuse to sign the Code, or they are re-detained following a breach of the Code and subsequent visa cancellation, this may result in the separation of family. The Minister has the ability at any time to consider granting the person a visa under his personal powers if he considers it is appropriate. The rights relating to family and the best interests of the child would be taken into account as part of the decision as to whether to exercise the discretion to cancel the visa, and balanced against the seriousness of the breach of the Code, or consequences if the person refused to sign the Code.

Therefore, these amendments engage articles 3 of the CRC and articles 17(1), 23 and 24 of the ICCPR, but these rights will be considered in respect to the BVE holder's individual circumstances.

Non-refoulement

Article 3(1) of the CAT and Articles 6 and 7 of the ICCPR –

The amendments potentially engage Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Articles 6, and 7 of the ICCPR.

These obligations would only be engaged in circumstances where the cancellation of a BVE results in the removal of an individual. This will not necessarily be the outcome in such cases.

Individuals would not be subject to removal unless and until their claims for protection had been assessed according to law.

The right to social security

The amendments also engage human rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 9 of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

The Committee on Economic Social and Cultural Rights General Comment No. 19 states:

Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees.

Within the code of behaviour for which this amendment relates, it states 'If you are found to have breached the Code of Behaviour, you could have your income support reduced'.

Article 9 allows a State to impose restrictions on the provision of social security to non-nationals, provided that such distinctions do not amount to prohibited discrimination under

article 2(2). Distinctions in treatment on a prohibited ground are permitted if the distinction meets the test for legitimate differential treatment; this requires that the distinctions pursue a legitimate aim, are based on reasonable and objective criteria and are proportionate to that aim. The legitimate aim for these amendments is to maintain community safety while non-nationals remain on BVEs in the community and the Code is tailored to this objective. The potential reduction in income support is one method of encouraging behaviour in accordance with community standards and is reasonable and objective and proportionate to that aim.

The right to an adequate standard of living

The amendments also engage human rights instrument, the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The Committee on Economic Social and Cultural Rights General Comment No. 12 states:

Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees.

Furthermore the committee stated in General Comment 19:

Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant.

While a breach of the code of behaviour may result in a person's income support being reduced, the impact that such a reduction would have on the persons' standard of living would be considered in determining whether a reduction was appropriate. There will be strong policy guidance on the circumstances on when a reduction in income support may be appropriate where a breach of the Code has occurred.

These amendments engage article 11(1), however the government is of the view that these amendments are proportionate to achieving its stated purpose and will be exercised in a manner that is consistent with 11(1) of the ICCPR.

Conclusion

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

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

Details of the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013

Section 1 – Name of regulation

This section provides that the name of the Regulation is the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013* ('the Regulation').

Section 2 – Commencement

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

The purpose of this section is to provide for when the amendments made by the Regulation commences.

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 – Schedule 1 (at the end of subitem 1305(3))

This item adds new paragraphs 1305(3)(f) and (g) into item 1305 in Schedule 1 of the Principal Regulations as requirements to validly make an application for a Bridging E (Class WE) visa ('Class WE visa') under item 1305.

Item 1305 provides for the requirements for a valid application of a Class WE visa.

Paragraph 1305(3)(f) requires that for an applicant to make a valid application for a Class WE visa, that applicant must not have previously held a Class WE visa that has been cancelled by reason of a failure to comply with condition 8564 or condition 8566.

Condition 8564 provides that the holder must not engage in criminal conduct.

Condition 8566 is inserted by item 6 below.

Paragraph 1305(3)(g) requires that for an applicant to make a valid application for a Class WE visa, that applicant has not previously held a visa that had been cancelled on a ground specified in paragraph 2.43(1)(p) or (q).

Regulation 2.43 provides for the prescribed grounds for cancellation of a visa for the purposes of paragraph 116(1)(g) of the Act (which deals with circumstances in which the Minister may cancel a visa).

Paragraph 2.43(1)(p) provides that in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa - that the Minister is satisfied that the holder:

- (i) has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country; or
- (ii) has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country; or
- (iii) is the subject of a notice (however described) issued by Interpol for the purposes of locating the holder or arresting the holder; or
- (iv) is the subject of a notice (however described) issued by Interpol for the purpose of providing either or both of a warning or intelligence that the holder:
 - A. has committed an offence against a law of another country; and
 - B. is likely to commit a similar offence; or
- (v) is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning that the holder is a serious and immediate threat to public safety;

Paragraph 2.43(1)(q) provides that in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa - that:

- (i) an agency responsible for the regulation of law enforcement or security in Australia has advised the Minister that the holder is under investigation by that agency; and
- (ii) the head of that agency has advised the Minister that the holder should not hold a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa.

The purpose of adding paragraphs 1305(3)(f) and (g) to item 1305 is to ensure that a person who has previously had a visa cancelled for criminal or security related reasons, or had failed to comply with visa conditions 8564 or condition 8566, cannot validly apply for a Class WE visa. A person who cannot lodge a valid application due to paragraphs 1305(3)(f) and (g) can still apply for, and be granted, other visas under the migration legislation if they meet the relevant requirements.

Item 2 – Schedule 2 (at the end of Division 050.2)

This item adds new clause 050.225 after clause 050.224 in Schedule 2 to the Principal Regulations.

Subdivision 050.22 provides for the criteria to be satisfied by a Class WE visa applicant at the time of decision.

New clause 050.225 provides that if an applicant:

- is at least 18 at the time of application; and
- holds, or has previously held, a Class WE visa granted under section 195A of the Act;

the applicant satisfies public interest criterion 4022 ('PIC 4022').

PIC 4022 is inserted by item 4 below.

Section 195A of the Act gives the Minister for Immigration and Border Protection the power to grant a person in immigration detention a visa, whether or not the person has applied for the visa. The Minister's power to grant the person a visa is not bound by Subdivision AA, AC or AF of Division 3 of the Act or by the regulations.

Subdivision AA provides for certain requirements for applications for visas. Subdivision AC provides for certain requirements for the grant of visas. Subdivision AF provides for certain provisions in relation to Bridging Visas.

The effect of this clause is that, to meet the time of decision criteria for the grant of a Class WE visa, applicants who are at least 18 years old at the time of application and were previously granted Class WE visas by the Minister under section 195A of the Act are required to satisfy the PIC 4022.

The purpose of this clause is to implement the Government's policy intention to hold people who are granted a visa by the Minister under section 195A to a higher level of accountability that is currently the case for these visa holders. As such, under the amendment, if required, certain Class WE visa applicants must sign a code of behaviour prior to being granted a Class WE visa.

Item 3 – Schedule 2 (at the end of Division 050.6)

This item inserts new clause 050.619 after clause 050.618 of Schedule 2 to the Principal Regulations.

Division 050.6 of Schedule 2 to the Principal Regulations provides for visa conditions that could apply to the bridging visa if granted.

New clause 050.619 provides that in addition to any other condition imposed by another provision of Division 050.6, if the person to whom the visa is granted has

signed a code of behaviour that is in effect for the visa, condition 8566 must be imposed.

The purpose and effect of new clause 050.619 is that where the non-citizen to whom the visa would be granted has signed a code of behaviour that is in effect for that visa, condition 8566 must be imposed. The imposition of condition 8566 means that the non-citizen must not breach the code of behaviour that is in effect for that visa. The non-citizen can be required to sign a code of behaviour as part of the requirement to satisfy PIC 4022, or as required by the Minister before the exercise of power under section 195A of the Act.

Item 4 – Schedule 4 (at the end of Part 1)

This item adds new PIC 4022 in Schedule 4 to the Principal Regulations.

The new PIC 4022 provides that either:

- the applicant has signed a code of behaviour that has been approved by the Minister in accordance with Part 4 of Schedule 4 to the Principal Regulations, and the code of behaviour is in effect for the subclass of visa; or
- the Minister does not require the applicant to sign a code of behaviour that is in effect for the subclass of visa.

The effect of this clause is that if the clause is applicable to an applicant, then unless the Minister had determined that the applicant is not required to sign a code of behaviour, the applicant is required to sign a code of behaviour that had been approved by the Minister and was in effect for the subclass of visa. As PIC 4022 must be satisfied before the grant of a visa, if the visa applicant is required to sign to a code of behaviour, they cannot be granted a visa unless they have signed the code of behaviour.

The purpose of the amendment is to implement the Government's policy intention to hold people who are or have been granted a visa by the Minister under section 195A to a higher level of accountability.

In addition, the purpose of providing that the Minister may not require an applicant to sign a code of behaviour is so that the Minister can flexibly deal with situations where it may not be practical or possible for the applicant to sign the code.

Item 5 – Schedule 4 (at the end of Part 3)

This item adds Part 4 after Part 3 of Schedule 4 of the Principal Regulations.

Part 4 provides that for public interest criterion 4022, the Minister must, by instrument in writing, approve one or more written codes of behaviour for the subclasses of visas specified in the instrument.

The purpose and effect of Part 4 allows the Minister to approve instruments in writing that provide for codes of behaviour for specific subclasses. This allows the Minister to

approve codes of behaviour for the purposes of clause 050.619, PIC 4022 and condition 8566.

This Part allows the Minister to approve a code to make the requirements of PIC 4022 and condition 8566 effective, and to approve new and revoke old codes, as necessary.

Item 6 – At the end of Schedule 8

This item adds new condition 8566 at the end of Schedule 8 to the Principal Regulations.

Condition 8566 provides that if the person to whom the visa is granted has signed a code of behaviour that is in effect for the visa, the holder must not breach the code.

The effect of the condition is that a person who has signed a code of behaviour approved by the Minister and that is in effect for Subclass 050, and who has subsequently been granted a Subclass 050 visa, is required to not breach that code of behaviour. A failure to meet this condition also enables the Minister to cancel the visa under paragraph 116(1)(b) of the Act, which relevantly provides that the Minister may cancel a visa if he or she is satisfied that its holder has not complied with a condition of the visa.

Item 7 – At the end of Schedule 13

This amendment adds Part 25 – Amendments made by the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013.

The title of new item 2501 is ‘Operation of Schedule 1’.

New subitem 2501(1) provides that the amendment made by item 1 of Schedule 1 to the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013* applies to applications for visas made on or after 14 December 2013, the day that the Schedule commences.

New subitem 2501(2) provides that the amendments made by items 2 to 6 of Schedule 1 to the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013*, other than the amendments made by items 1, 3 and 4 of that Schedule, apply in relation to an application for a visa made, but not finally determined, before 14 December 2014, the day that the Schedule commences.

The purpose of item 2501 is to clarify to whom the amendments in this Regulation applies.