**EXPLANATORY STATEMENT**

Select Legislative Instrument No. 162, 2014

Issued by the Minister for Immigration and Border Protection

*Migration Act 1958*

*Migration Amendment (Subclass 050 visas) Regulation 2014*

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration 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 Migration Act.

In addition, regulations may be made pursuant to the provisions of the Migration Act detailed in Attachment A.

The purpose of the *Migration Amendment (Subclass 050 Visas) Regulation 2014* (the Regulation) is to amend the *Migration Regulations 1994* (the Migration Regulations) to provide greater flexibility in allowing permission to work for certain Subclass 050 (Bridging (General)) visa (BVE) holders.

Previously, a “no work” condition (condition 8101) had to be mandatorily imposed on some BVEs granted by the Minister and could not be imposed on others. This amendment ensures that the “no work” condition may be imposed on a discretionary basis where the Minister has granted the BVE personally under section 195A of the Migration Act to persons who were in immigration detention.

The Regulation also makes a technical amendment to remove a redundant provision identified by the Office of Parliamentary Counsel from the BVE criterion regarding applicants in criminal detention.

Statements of Compatibility with Human Rights (Statements) have been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statements’ overall assessment is that the Regulation is compatible with human rights. A copy of the Statements is at Attachment B.

Details of the Regulation are set out in Attachment C.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the amendments made by the Regulation. Regarding the amendments made by items 2 and 3 of Schedule 1, OBPR advises that the proposal is likely to have minor regulatory impact on individuals and that a Regulation Impact Statement is not required. The OBPR consultation reference is 17412. As the amendment made by item 1 of Schedule 1 only removes a redundant provision no consultation with OBPR was undertaken.

No other consultation was necessary for this Regulation as the amendments are minor and are made to ensure that there is flexibility in which work conditions apply to a BVE granted by the Minister under section 195A. These amendments will only apply where a non-citizen is considered for grant of a BVE under section 195A of the Migration Act.  These amendments do not extend to non-citizens who have been or will be granted a BVE by other means, for example non-citizens who have made an application for a BVE.

Section 195A of the Migration Act provides that the Minister may grant a person who is in immigration detention a visa of a particular class (whether or not the person has applied for the visa).  The Minister must consider that it is in the public interest to grant such a visa.  The power under section 195A can only be exercised by the Minister personally.  The Minister cannot be compelled to exercise his power under section 195A.

As a result, the amendments will impact people who:

* are unlawful non-citizens;
* are detained under section 189 of the Migration Act; and
* the Minister decides to grant a BVE using his personal, non-compellable power.

In practice, where the Minister grants a BVE under section 195A, it is to people who are otherwise ineligible for the grant of a visa (for example, because the Migration Act prevents them from making a valid visa application).  The amendments therefore ensure that the Minister can impose conditions on a discretionary basis where he decides to grant a BVE to someone who is not otherwise eligible for that visa.  There was previously inflexibility around the availability of permission to work for some non-citizens who are granted a BVE by the Minister personally. The amendments will rectify this and ensure that the “no work” condition can be applied flexibly on a case by case basis.

When granting a BVE under section 195A, the Minister must impose conditions according to Division 050.6 of Part 050 in Schedule 2 to the Regulations.  The amendments create a new clause under Division 050.6 of the Regulations (“Conditions”).  New clause 050.616A makes certain visa conditions discretionary where a BVE is granted by the Minister using his power under section 195A.  This clause mirrors the conditions clause under 050.617, which applies “in any other case” (that is, where no other clause under Division 050.6 applies to the non-citizen).  This clause includes a number of discretionary conditions to reflect the fact that it operates in a range of circumstances.  It is appropriate that, where the Minister grants a BVE under section 195A (which also occurs in a range of circumstances), the same discretionary conditions are available.

This accords with a circumstance where consultation may not be necessary under section 18 of the *Legislative Instrument Act 2003* (Legislative Instruments Act).

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

The Regulation commences on 23 November 2014.

**ATTACHMENT A**

**AUTHORISING PROVISIONS**

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor‑General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration 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 Migration Act.

In addition, the following provisions of the Migration Act may apply:

* subsection 31(3), which provides that the *Migration Regulations 1994* (Migration Regulations) may prescribe criteria for a visa or visas of a specified class;
* subsection 31(5), which provides that a visa is a visa of a particular class if the Migration Act or the Migration Regulations specify that it is a visa of that class;
* subsection 40(1), which provides that the Migration Regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
* Subsection 41(3), which relevantly provides that the Minister may specify that a visa is subject to such conditions as are permitted by the Migration Regulations for the purposes of this subsection.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

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

**Migration Amendment (subclass 050 visas) Regulation 2014**

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 – item 1 of Schedule 1**

This Legislative Instrument seeks to make technical amendments to the *Migration Regulations 1994* (the Migration Regulations) to remove a redundant paragraph in subclause 050.212(7) of the Migration Regulations.

Subclause 050.212(7) of the Migration Regulations, which relates to a criterion that must be satisfied at the time of application by an applicant for the grant of a Subclass 050 (Bridging (General)) visa (BVE), currently states:

An applicant meets the requirements of this subclause if he or she:

1. is in criminal detention; and
2. if he or she has been sentenced to imprisonment or periodic detention, has actually served a period of imprisonment; and
3. no criminal justice stay certificate or criminal justice stay warrant about the non-citizen is in force.

The amendment replaces the current subclause 050.212(7) with a new subclause 050.212(7) that omits paragraph 050.212(7)(b) requiring the applicant to have actually served a period of imprisonment if he or she has been sentenced to imprisonment or periodic detention.

The term “criminal detention” referred to in paragraph 050.212(7)(a) is defined in regulation 1.03 as having the meaning set out in regulation 1.09. Relevantly, regulation 1.09 provides that for the purpose of the Migration Regulations, a person is in criminal detention if he or she is:

1. serving a term of imprisonment (including periodic detention) following conviction for an offence; or
2. in prison on remand;

but not if he or she is:

1. subject to a community service order; or
2. on parole after serving part of a term of imprisonment; or
3. on bail awaiting trial.

Given the meaning of “criminal detention”, a bridging visa applicant who is in criminal detention within the meaning of paragraph 050.212(7)(a) will, by definition, also meet the requirement in paragraph 050.212(7)(b) to have actually served a period of imprisonment, being the period they have already served, however short that period is, since going into criminal detention. Therefore, paragraph 050.212(7)(b) is redundant because it does not serve any purpose other than what is already covered by paragraph 050.212(7)(a).

Therefore, the amendment is purely technical to remove a redundancy by omitting the current paragraph 050.212(7)(b).

*Human rights implications*

The amendment has been assessed against the seven core human rights treaties.

The purpose of this amendment is purely technical to remove a redundancy. It does not in any way affect the intended operation of subclause 050.212(7), which is to maintain the lawful (immigration) status of a person who is criminal detention.

This amendment has no impact on a person’s eligibility for a BVE under subclause 050.212(7) if they are currently in criminal detention, because being in criminal detention means that they will necessarily have served at least some of their term of imprisonment. The amendment has no impact on whether a person is deprived of their liberty other than in accordance with procedures established by law, and so it does not engage Article 9(1) of the ICCPR, relating to the right to liberty and security of person.

*Conclusion*

The amendment to the Migration Regulations described in this statement is compatible with human rights as it does not raise any human rights issues.

**Overview of the Legislative Instrument – items 2 and 3 of Schedule 1**

*Scope of the amendments*

These amendments are confined to non‑citizens who are being considered for grant of a  BVE under section 195A of the *Migration Act 1958* (the Migration Act). These amendments do not extend to non‑citizens who have been or will be granted a BVE by other means, for example non‑citizens who have made an application for a BVE.

As a result, these amendments will impact people who:

* are unlawful non‑citizens;
* are detained under section 189 of the Migration Act; and
* are granted a BVE by the Minister exercising his or her public interest power under section 195A.

*Section 195A of the Act*

Section 195A of the Migration Act provides that I may grant a person who is in immigration detention a visa of a particular class (whether or not the person has applied for the visa). I must consider that it is in the public interest to grant such a visa. The power under section 195A can only be exercised by me personally and I cannot be compelled to exercise that power.

*The Subclass 050 (Bridging (General)) visa*

In practice, where I grant a BVE under section 195A, it is to grant a visa to people who are otherwise ineligible for the grant of a visa (for example, because the Migration Act prevents them from making a valid visa application).

The BVE is used in a range of circumstances and may be granted to non‑citizens who:

* are making arrangements to depart Australia;
* are awaiting the final determination of a visa application;
* have had their visa cancelled where the non‑citizen wishes to pursue merits review of the cancellation decision;
* are seeking judicial review of their visa decision;
* are seeking Ministerial Intervention; or
* are in criminal detention.

The conditions to be imposed on a BVE depend on which of the above circumstances apply to the non-citizen. The conditions which may or must be imposed are determined by the conditions clauses set out in Part 050.6 of the Migration Regulations.

*These amendments – making conditions discretionary on BVEs granted under section 195A*

When granting a BVE under section 195A, I must impose conditions according to section 050.6 of the Migration Regulations. The amendments create a new clause 050.616A which makes certain visa conditions discretionary where a BVE is granted by me using my power under section 195A. This clause mirrors the conditions clause under 050.617 that applies “in any other case” (that is, where no other clause under Part 050.6 applies to the non‑citizen). This clause includes a number of discretionary conditions to reflect the fact that it operates in a range of circumstances. It is appropriate that, where I grant a BVE under section 195A (which also occurs in a range of circumstances), the same discretionary conditions are available.

New visa condition 8116 which allows BVE holders to engage in approved activities specified in a legislative instrument made by the Minister, came into effect on 6 October 2014. Condition 8116 will is included as a discretionary condition in new clause 050.616A to mirror its inclusion in clause 050.617.

New clause 050.616A makes condition 8101 (the “no work” condition) discretionary on any BVE granted by me under section 195A. Currently, there are a number of clauses under Division 050.6 of Schedule 2 to the Migration Regulations, and these clauses operate to make a “no work” condition mandatory in some cases and unavailable in others.

As a result I sometimes cannot impose a “no work” condition in circumstances where I consider it would not be appropriate for a BVE holder to have permission to work. Equally, I am sometimes bound to impose a ‘no work’ condition in circumstances where I might not otherwise impose it.

The introduction of new clause 050.616A overcomes this inflexibility by making condition 8101 discretionary on all BVEs granted by me under section 195A. This will allow me to determine whether or not it is appropriate to give a non‑citizen permission to work depending on their circumstances and in exceptional cases.

To the extent that these amendments could result in a “no work” condition being imposed on a BVE granted by me under section 195A, the amendments engage Articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 3 of the Convention on the Rights of the Child (CRC).

International Covenant on Economic, Social and Cultural Rights

*Right to work*

As the amendment allows me to impose condition 8101 (“no work”) on persons granted a visa under section 195A of the Act, the amendment engages the right to work in Article 6(1) of the ICESCR.

Article 6(1) of the ICESCR states:

*The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

However, Article 4 of the ICESCR provides that States Parties may limit the rights contained in the ICESCR where lawful to do so, and for the purpose of promoting the general welfare of democratic society.

The practical effect of condition 8101 is that a person may not be entitled to work in Australia while awaiting the resolution of their immigration status. Condition 8101 is lawful by virtue of its existence in the Regulations and is a necessary measure for the welfare of democratic society as it protects the integrity of the migration programme, including by ensuring the policy intent of the programme is reflected in the behaviour of visa holders. Currently, condition 8101 is imposed on a wide range of temporary visas.

Whether or not an individual is given permission to work on a BVE will depend on their personal circumstances and immigration history. Permission to work may be given to BVE holders in order to encourage them to remain lawful and engaged with the department and to work towards a voluntary immigration outcome. However, condition 8101 may be imposed on a BVE granted to a non‑citizen who has ceased to cooperate with the department. Condition 8101 would also generally be imposed on a BVE granted to a non-citizen who has no lawful basis to remain in Australia. The objective of imposing condition 8101 on BVEs, namely protecting the integrity of the migration programme, is for the general welfare of Australian society.

However, this amendment also positively engages Article 6(1) of the ICESCR insofar as it provides me with the opportunity to *not* impose condition 8101 in circumstances in which I would otherwise have been required to do so. This is because, where the Regulations state that certain conditions must be imposed on a BVE, I am bound to impose those conditions when using my personal power under section 195A.

Therefore, to the extent that condition 8101 limits the right to work as recognised in Article 6(1) of the ICESCR, any limitation is lawful and for promotion of the general welfare of democratic society.

*Right to an adequate standard of living*

To the extent that this amendment may result in the imposition of condition 8101 on a visa granted under section 195A of the Migration Act, Article 11(1) of the ICESCR is engaged.

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.*

People who are granted a BVE under section 195A with condition 8101 are unable to work, but may nonetheless have access to financial support. For example, BVE holders may have access to the Community Assistance Support (CAS) programme. Support under the CAS programme is available in circumstances where people have a prescribed vulnerability and are unable to access adequate support in the community or to support themselves. It is available to bridging visa holders who meet the eligibility criteria. In the case of eligible Protection visa applicants, support may also be available under the Asylum Seeker Assistance Scheme (ASAS).

The purpose of the ASAS and CAS programmes is to provide appropriate support and care to those that the department has assessed as requiring financial assistance. A range of services and support are available under the CAS and ASAS programmes, which are tailored to the individual person. The eligibility criteria for the CAS and ASAS programmes include a requirement for the person to engage with the department to resolve their immigration status. In future, support payments will be available to BVE holders under the Status Resolution Support Services programme on a similar basis to the CAS and ASAS programmes.

In circumstances where support may not be available this will generally be because the person has not been assessed to have a prescribed vulnerability or (for non‑citizens who have made an application for a substantive visa which has been finally determined) they are not engaging with the department to resolve their immigration status. The Government considers that this limitation on Article 11 of the ICESCR is lawful and for the general welfare of democratic society, namely to ensure that non-citizens are engaging with the department to resolve their immigration status. As such, the imposition of condition 8101 in these circumstances maintains the integrity of Australia’s immigration framework.

Under these amendments, I will be able to consider the availability of support when deciding whether or not to impose a “no work” condition on a BVE granted under section 195A. Without these amendments, however, I might be required to impose a ‘no work’ condition regardless of whether such support is available.

*Convention on the Rights of the Child*

Article 3 of the CRC provides that, in all actions concerning a child, the best interests of the child will be a primary consideration. However, Article 3 of the CRC requires the best interests of the child to be *a* primary consideration, not *the* primary consideration. As such, other considerations may also be primary considerations and may outweigh the best interests of the child in certain circumstances. Such countervailing considerations may include the integrity of the migration program and the security of the Australian community.

Under these amendments, I may consider the best interests of the child when deciding whether or not to impose condition 8101 on a BVE granted under section 195A, in particular, how the inability of a parent to work may impact upon any dependent children. Without these amendments, however, I might be required to impose a “no work” condition even though this might not be in a child’s best interests.

**Conclusion**

The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights articulated in the ICESCR, those limitations are lawful and for the purpose of promoting the general welfare of democratic society.

In relation to the CRC, the Legislative Amendment represents a positive engagement with the best interests of the child as a primary consideration and as such, is consistent with Article 3 of the CRC.

**The Hon. Scott Morrison MP**

**Minister for Immigration and Border Protection**

**ATTACHMENT C**

**Details of the *Migration Amendment (Subclass 050 visas) Regulation 2014***

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment (Subclass 050 visas) Regulation 2014* (the Regulation).

Section 2 – Commencement

This section provides that this regulation commences on 23 November 2014.

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

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (the Migration Act).

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

Section 4 – Schedules

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

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

**Schedule 1 – Amendments**

Item 1 – Subclause 050.212(7) of Schedule 2

This item repeals and substitutes subclause 050.212(7) of Schedule 2 to the Migration Regulations to correct a typographical error, in the form of a duplication of the words “if he or she”, in the chapeau to the subclause.

The redrafted sub-clause also improves consistency of wording by referring to “the applicant” rather than “the non-citizen” and removes the redundant provision 050.212(7)(b) “if he or she has been sentenced to imprisonment or periodic detention, has actually served a period of imprisonment”.

This provision is redundant because the term “criminal detention” as referred to in paragraph 050.212(7)(a), is defined in regulation 1.03 as having the meaning set out in regulation 1.09. Regulation 1.09 provides that for the purpose of the Migration Regulations, a person is in criminal detention if he or she is:

1. serving a term of imprisonment (including periodic detention) following conviction for an offence; or
2. in prison on remand;

but not if he or she is:

1. subject to a community service order; or
2. on parole after serving part of a term of imprisonment; or
3. on bail awaiting trial.

Given this meaning of “criminal detention”, a bridging visa applicant who is in criminal detention within the meaning of paragraph 050.212(7)(a) (which must be satisfied) will, by definition, also meet the requirement in paragraph 050.212(7)(b). Therefore, paragraph 050.212(7)(b) is redundant because it does not serve any purpose or impose any requirement other than what is already covered by paragraph 050.212(7)(a).

The changes made by this item are purely technical and do not affect policy settings.

Item 2 – Subclause 050.613A(1) of Schedule 2

This item inserts the words “or 050.616A” immediately after the words “clause 050.613” in subclause 050.613A(1) of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations).

New subclause 050.613A(1) provides that in the case of a visa granted to an applicant (whether or not the applicant is an applicant to which any other clause is this Division applies, other than clause 050.613 or 050.616A) who:

* applies for a Protection (Class XA) visa; and
* is not in a class of persons specified by the Minister by instrument in writing for this paragraph:

Condition 8101, unless condition 8116 is imposed.

This amendment is consequential to the amendments made below at item 3.

The purpose and effect of this amendment is to ensure that the imposition of any conditions on those Subclass 050 visas granted by the Minister under section 195A of the Migration Act would not be affected by the operation of subclause 050.613A(1).

Item 3 – After clause 050.616 of Schedule 2

This item inserts new clause 050.616A into Part 050 of Schedule 2 to the Migration Regulations.

New clause 050.616A provides that:

* In the case of a visa granted under section 195A of the Act (whether or not the holder of the visa is a person to whom another clause in this Division would otherwise apply)—any one or more of conditions 8101, 8104, 8116, 8201, 8207, 8401, 8402, 8505, 8506, 8507, 8508, 8510, 8511, 8512 and 8548 may be imposed.
* Condition 8116 must not be imposed unless the holder of the visa is in a class of persons specified by the Minister, by legislative instrument, for this subclause.

Division 050.6 of Part 050 in Schedule 2 to the Migration Regulations sets out the conditions that may be imposed on the grant of the Subclass 050 (Bridging (General)) visa (Subclass 050 visa). Relevantly, some conditions imposed are mandatory and some conditions are, subject to certain considerations, at the discretion of the officer.

As a result of the operation of the existing clauses in part 050.6 of Schedule 2 to the Migration Regulations, it is possible for conditions such as 8101 to be imposed on a mandatory basis in circumstances where the Minister may consider that it is not appropriate to do so.

The purpose of this amendment is that the imposition of any conditions on those Subclass 050 visas granted by the Minister under section 195A of the Migration Act will be applied on a discretionary basis, enabling the Minister to consider whether the application of the conditions would be appropriate in the circumstances on a case by case basis.

The effect of the new clause is that the Minister may apply conditions on a discretionary basis to Subclass 050 visas as appropriate in the circumstances of those cases where the Minister is granting a Subclass 050 visa under section 195A of the Migration Act.

The new subclause 050.616A(2) provides that condition 8116 must not be imposed unless the holder of the visa is in a class of persons specified by the Minister.

This amendment aligns new clause 050.616A with the requirements of clauses 050.613A, 050.615A, 050.617 in part 050.6 [Conditions] of Schedule 2 to the Migration Regulations which require that condition 8116 must not be imposed unless the holder of the visa is in a class of persons specified by the Minister, by legislative instrument.

The application of condition 8116 to a Subclass 050 visa holder means that the visa holder must not work in Australia other than by engaging in an activity specified in a legislative instrument made by the Minister.

Item 4 – At the end of Schedule 13

This item amends Schedule 13 of the Migration Regulations to insert a new Part 37, entitled “Amendments made by the Migration Amendment (Subclass 050 Visas) Regulation 2014”, which contains new clause 3701, entitled “Operation of Part 1 of Schedule 1”.

New subclause 3701(1) provides that the amendments of the Migration Regulations made by item 1 of Part 1 of Schedule 1 to the Regulationapply in relation to an application for a BVE made on or after 23 November 2014.

New subclause 3701(2) provides that the amendments of the Migration Regulations made by items 2 and 3 of Schedule 1 to the Regulationapply in relation to a BVE granted under section 195A of the Migration Act on or from 23 November 2014.

The purpose of these amendments is to clarify to whom the amendments in the Regulation applies.