
# Parliamentary Joint Committee on Human Rights

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Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 3 – 6 March 2014

Legislative Instruments received
22 – 28 February 2014

Fourth Report of the 44th Parliament

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# Membership of the committee

**Members**

| | |
|---|---|
| Senator Dean Smith, Chair | Western Australia, LP |
| Mr Laurie Ferguson MP, Deputy Chair | Werriwa, New South Wales, ALP |
| Senator Sue Boyce | Queensland, LP |
| Dr David Gillespie MP | Lyne, New South Wales, NAT |
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| Senator the Hon Ursula Stephens | New South Wales, ALP |
| Senator Penny Wright | South Australia, AG |
| Mr Ken Wyatt AM MP | Hasluck, Western Australia, LP |

# Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

**Secretariat**

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# Abbreviations

| Abbreviation | Definition |
|---|---|
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | Convention on the Elimination of Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| FRLI | Federal Register of Legislative Instruments |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |

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# Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 3 to 6 March 2014 and legislative instruments received during the period 22 to 28 February 2014. The committee has also considered responses to the committee's comments made in previous reports.

**Bills introduced 3 to 6 March 2014**

The committee considered seventeen bills, all of which were introduced with a statement of compatibility; however one of these did not meet the committee's expectations for statements to read as stand-alone documents.[1] Of these seventeen bills, nine do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to further defer its consideration of one bill to enable closer consideration of the human rights issues.[2]

The committee has identified eight bills that it considers require further examination and for which it will seek further information.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 17 March 2014 include:

- Farm Household Support Bill 2014;
- Farm Household Support (Consequential Amendments) Bill 2014;
- Quarantine Charges (Collection) Bill 2014 and three related bills;
- Export Market Development Grants Bill 2014; and
- Civil Aviation Amendment (CASA Board) Bill 2014.

The Qantas Sale Amendment Bill 2014 is currently before the Senate, having been introduced in and passed by the House of Representatives on 6 March 2014.

**Legislative instruments received between 22 and 28 February 2014**

The committee considered 49 legislative instruments received between 22 and 28 February 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 49 instruments, none appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. However, the committee notes that a number of exempt instruments were not accompanied by a statement of compatibility. While such instruments are not required to be

1 Export Market Development Grants Bill 2014.

2 See Fair Work Amendment Bill 2014, p 35.

accompanied by a statement of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee is required to assess all legislative instruments for compatibility with human rights and regards the preparation of a statement of compatibility for exempt instruments, particularly where they involve limitations on human rights, as a best-practice approach.

**Responses**

The committee has considered 12 responses relating to matters raised in relation to bills and legislative instruments in previous reports. Of these, the responses relating to one bill and one instrument appear to have adequately addressed the committee's concerns.[3]

The committee retains concerns and/or has sought further information or the inclusion of safeguards in relation to three bills and seven instruments. The committee will write again to the relevant Ministers in relation to these matters where further information is required.

**Senator Dean Smith**
**Chair**

3 See Native Title (Assistance for Attorney-General) Amendment Guidelines 2013, pp 137-140 and Social Services and Other Legislation Amendments Bill 2013, pp 141-146.

# Part 1

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# Bills introduced
# 3 – 6 March 2014

# Bills requiring further information to determine human rights compatibility

## Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014

*Portfolio: Attorney-General*
*Introduced: House of Representatives, 5 March 2014*

### Summary of committee concerns

1.1 The committee notes that a number of the measures in this bill have been re-introduced as a result of the lapsing of the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (the 2012 bill) at the end of the 43rd Parliament.

1.2 The committee draws attention to its previous comments in relation to the 2012 bill.[1] The committee reiterates its concerns that the unexplained wealth scheme in the *Proceeds of Crime Act 2002* (POC Act) sought to be amended by this bill may involve the determination of a criminal charge, and that the operation of the presumption of unlawful conduct involves a significant encroachment on the right to a fair hearing. The committee also re-iterates its expectation that statements of compatibility include sufficient justification for proposed limitations on rights, particularly where the committee has previously raised concerns with a measure.

1.3 In relation to measures in the current bill which were not previously contained in the 2012 bill (and accordingly have not previously been commented on), the committee:

- seeks clarification as to why it is necessary to enable an unexplained wealth order to be made in relation to a person in the absence of that person, given the implications of this measure for the right to a fair hearing; and
- notes the lack of justification included in the statement of compatibility for the information disclosure provisions proposed by the bill.

1 Parliamentary Joint Committee on Human Rights; *First Report of 2013*, p 27; *Third Report of 2013*, p 120; and *Sixth Report of 2013*, p 189.

## Overview

1.4 This bill seeks to make amendments to the POC Act and is intended to strengthen the Commonwealth's unexplained wealth regime and improve the investigation and litigation of unexplained wealth matters.

1.5 The existing unexplained wealth regime in the POC Act enables a court to compel a person to attend court and prove, on the balance of probabilities, that their wealth was not derived from one or more relevant offences. If a person cannot demonstrate this, the court may order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.

1.6 There are three types of orders which can be sought under the POC Act in relation to unexplained wealth:

- *Unexplained wealth restraining orders*: interim orders that restrict a person's ability to dispose of or otherwise deal with property.
- *Preliminary unexplained wealth orders*: orders requiring a person to attend court to demonstrate whether or not his or her wealth was derived from lawful sources. If a court is not so satisfied, it must then make an unexplained wealth order. The court has a discretion whether to make the order in certain circumstances.[2]
- *Unexplained wealth orders*: final orders that make payable to the Commonwealth the difference between a person's total wealth and the value of the person's property which the court is satisfied was not derived from the commission of a relevant offence.

1.7 The bill seeks to amend the POC Act to:[3]

- include a statement in the objects clause about undermining the profitability of criminal enterprise;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- streamline affidavit requirements for preliminary unexplained wealth orders;

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2 The bill proposes to remove the general discretion the court has to decline to make an order, however discretion will remain where the amount of suspected unexplained wealth is less than $100,000 or it is not in the public interest to make the order (see existing sections 179B and 179E of the POC Act and items 14-18 of the bill).

3 The first eight amendments implement recommendations made by the Parliamentary Joint Committee on Law Enforcement (PJC-LE) following its inquiry into unexplained wealth legislation. See Parliamentary Joint Committee on Law Enforcement, Final Report, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, 19 March 2012.

- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court;
- harmonise legal expense and legal aid provisions for unexplained wealth cases with other POC Act proceedings to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order;
- remove a court's discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied;
- require the AFP Commissioner to provide a report to the PJC-LE annually on unexplained wealth matters, and to empower that committee to seek further information from federal agencies in relation to any such report;
- clarify that unexplained wealth orders may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding;
- ensure that provisions that determine when restraining orders cease to have effect take account of the new provisions allowing charges to be created and registered over restrained property, and the fact that unexplained wealth restraining orders may be made both after and before an unexplained wealth order;
- streamline the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place (or has been revoked);
- remove redundant and unnecessary affidavit requirements in support of applications for preliminary unexplained wealth orders; and
- ensure that a copy of the affidavit relied upon when a preliminary unexplained wealth order was made is provided to a person subject to the order in light of the above changes to the affidavit requirements for preliminary unexplained wealth orders.

1.8 The bill also seeks to extend the purposes for which information obtained under the coercive powers of the POC Act can be shared with a state, territory or foreign authority by:

- enabling the disclosure of information to a state or territory authority for proceedings under state or territory proceeds of crime laws or forfeiture laws, and/or to decide whether to institute proceedings under those laws; and

- enabling the disclosure of information, where the proceeds or instruments of crime concerned would be capable of being confiscated under Australian laws, to foreign authorities that have either or both the function of investigating or prosecuting offences against a law of that country and identifying, locating, tracing, investigating or confiscating proceeds of crime under a law of the country.

## Compatibility with human rights

### *Statement of compatibility*

1.9 The statement of compatibility for the bill notes that it engages the right to a fair hearing,[4] including minimum guarantees in criminal proceedings,[5] the right to privacy[6] and the prohibition on retrospective criminal offences.[7]

1.10 The statement concludes:

> [t]he Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that [the bill] may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of the Bill.[8]

### *Committee view on compatibility*

*Previous committee views*

1.11 As noted above, the committee reported on a number of the measures contained in the bill in its comments on the 2012 bill.[9] These are the measures to:

- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court in appropriate circumstances;

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4 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

5 Article 14(3) of the ICCPR.

6 Article 17 of the ICCPR.

7 Article 15 of the ICCPR.

8 Statement of compatibility, p 14.

9 Parliamentary Joint Committee on Human Rights; *First Report of 2013*, p 27; *Third Report of 2013*, p 120; and *Sixth Report of 2013*, p 189.

- harmonise legal expense and legal aid provisions for unexplained wealth cases with those for other POC Act proceedings to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order as can occur with other types of proceeds of crime order;
- remove a court's discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and
- expand the PJC-LE's oversight of unexplained wealth investigation and litigation.

1.12 The committee's comments addressed the compatibility of the above measures with the right to a fair hearing, the right to a fair trial and the right to privacy.

1.13 In particular, the committee sought further clarification from the former minister as to whether, with reference to human rights case law and jurisprudence, the unexplained wealth scheme in the POC Act should be viewed as effectively involving a criminal penalty for the purposes of the International Covenant on Civil and Political Rights (ICCPR). The committee noted that this question was relevant to an analysis of the minimum guarantees in criminal proceedings likely to be triggered by the measures in the 2012 bill, particularly the right to legal representation.

1.14 On consideration of the former minister's response, the committee remained concerned that the unexplained wealth provisions in the POC Act may involve the determination of a criminal charge.

1.15 Further, the committee noted that the presumption of unlawful conduct on which the unexplained wealth scheme is premised was a significant encroachment on the right to a fair hearing, and that the statement of compatibility and response from the minister had not provided sufficient justification for this limitation.

1.16 The committee draws attention to the comments on the 2012 bill and re-states these concerns in relation to the current bill.[10]

1.17 The committee notes that the statement of compatibility for the current bill is identical to the statement of compatibility for the 2012 bill, and does not address the concerns raised previously by the committee on this issue.

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10 Parliamentary Joint Committee on Human Rights; *First Report of 2013*, p 27; *Third Report of 2013*, p 120; and *Sixth Report of 2013*, p 189.

**1.18 The committee expects that, where it has raised concerns in relation to a measure in a bill, any subsequent re-introduction of the measure is accompanied by a statement of compatibility addressing the committee's previously identified concerns.**

*Right to a fair hearing*

1.19 The bill currently before the committee also includes a measure clarifying that unexplained wealth orders may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding. This:

> will ensure that persons in relation to whom a preliminary unexplained wealth order has been made are not able to frustrate unexplained wealth proceedings by simply failing to appear when ordered to do so. These are important features of the laws, which serve the justified and reasonable purpose of preventing a person from dispersing his or her assets during the time between an order being sought and an order being made.[11]

1.20 However, the statement of compatibility also states that:

> [i]n some situations, applications for POC Act orders such as unexplained wealth restraining orders or preliminary unexplained wealth orders may be heard without notice being given to the person who is the subject of the application at the time the application is made.[12]

1.21 Given that in some circumstances an unexplained wealth restraining order or preliminary unexplained wealth order may be heard without notice being given to the person who is the subject of the order, it appears that a possible consequence of this measure is that a person may be the subject of an unexplained wealth order without being notified of such. In any case, given that the scheme operates on the basis of a presumption of unlawful conduct which a person must rebut in order to avoid the making of an unexplained wealth order against them, the committee has concerns regarding the compatibility of this measure with the right to a fair hearing.

1.22 In particular, it is not evident to the committee why it is necessary to enable a court to make an unexplained wealth order where the person is not present for the purpose of 'preventing a person from dispersing his or her assets during the time between an order being sought and an order being made'. It appears to the committee that the provision made by the POC Act for an unexplained wealth restraining order to be heard without notice being given to the person who is the subject of the application would be sufficient to achieve this objective.

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11 Statement of compatibility, p 9.

12 Statement of compatibility, p 9.

**1.23 The committee intends to write to the Minister for Justice to seek clarification as to why it is necessary to ensure a court is not prevented from making an unexplained wealth order in the absence of the person who is the subject of the order, including evidence or examples of where preventing the court from doing so has frustrated the objectives of the scheme.**

*Right to privacy*

1.24 As set out above, this bill also extends the purposes for which information obtained under the coercive powers of the POC Act can be shared with a State, Territory or foreign authority to include a proceeds of crime purpose.

1.25 As set out in the statement of compatibility, in order for limitations on the right to privacy to be justified, it must be demonstrated that the limitation serves a legitimate objective, is rationally connected to that objective and is proportionate to that objective. While the statement of compatibility sets out the reasons why the proposed information sharing provisions are necessary (ie, what the legitimate objective is), it does not address how the provisions are proportionate to this objective. Central to this analysis will be the safeguards that apply so as to ensure that such information sharing powers are appropriately circumscribed.

1.26 The committee notes that existing section 266A(2) of the POC Act sets out the threshold test for when such information may be disclosed to State, Territory and foreign authorities for purposes related to proceeds of crime. Such information may only be disclosed by a person for this purpose if the person believes on reasonable grounds that the disclosure will serve that purpose. Existing sections 266A(3) – (8) of the POC Act set out the limits on the use of the information disclosed.

1.27 The committee also notes that the provisions proposed by the bill allowing the disclosure of information to foreign authorities for the purposes of identifying, locating, tracing, investigating or confiscating proceeds of crime are further prescribed by limiting such disclosures to those countries where the identification, locating, tracing, investigation or confiscation could take place under Commonwealth, State or Territory proceeds of crime laws if the proceeds related to an offence against a law of the Commonwealth, State or Territory. In effect, this limits the disclosure of information to those countries where the proceeds or instruments of crime concerned would be capable of being confiscated under Australian laws, if the proceeds or instruments had related to an offence against Australian laws.[13]

13 See item 31 of the Bill.

**1.28 On this basis the committee makes no further comment on this measure. However, the committee re-iterates its expectation that statements of compatibility include sufficient justification of proposed limitations on rights, including how such limitations are proportionate to the objective sought to be achieved.**

# Export Market Development Grants Amendment Bill 2014

*Portfolio: Trade and investment*
*Introduced: House of Representatives, 6 March 2014*

## Summary of committee concerns

1.29 The committee seeks further information regarding the power of the CEO of Austrade to exclude an export market development grants consultant (EMDG consultant), where the CEO has formed the opinion that the EMDG consultant is not a fit and proper person.

## Overview

1.30 This bill seeks to amend the *Export Market Development Grants Act 1997* to:

- align the Export Market Development Grants (EMDG) scheme rules with a revised level of scheme funding;
- increase the number of grants able to be received by an applicant from seven to eight;
- reduce the minimum expenses threshold required to be incurred by an applicant from $20 000 to $15 000;
- reduce the current $5000 deduction from the applicant's provisional grant amount to $2500
- prevent the payment of grants to applicants engaging an EMDG consultant assessed to be a not fit and proper person; and
- enable a grant to be paid more quickly where a grant is determined before the 1 July following the balance distribution date.

## Compatibility with human rights

### *Statement of compatibility*

1.31 The bill is accompanied by a brief statement of compatibility, which states:

> This Bill 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*. This Bill is compatible with human rights as it does not raise any human rights issues.[1]

1 Statement of compatibility, p 3.

1.32 The committee notes that the statement of compatibility does not meet the committee's expectations. The committee expects statements of compatibility to read as self-contained documents and to include a description of the purpose and effect of the instrument.

**1.33 The committee intends to write to the Minister for Trade and Investment in an advisory capacity in relation to the committee's expectations for statements of compatibility.**

1.34 The committee also notes that the statement of compatibility concludes that the bill does not raise any human rights issues. However, the committee considers that this bill engages the right to privacy.[2] The committee's concerns are set out below.

## Committee view on compatibility

### *Right to privacy and reputation*

1.35 The right to privacy provides that 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.[3]

1.36 The committee has previously expressed the view that the right to privacy and reputation may extend to the protection of the professional and business reputation of a person.[4] The proposed power to determine that a person is not a 'fit and proper person' for the purposes of the Act therefore engages this right, insofar as such a finding may damage or encroach on a person's professional reputation as an EMDG consultant.

1.37 Where a bill provides for the limitation of the right to privacy and reputation, as in this case, the committee's usual expectation is that the statement of compatibility provide an assessment of whether the limitation is to be imposed in pursuit of a legitimate objective, and whether it is both necessary and proportionate to achieving that objective. This assessment will generally need to provide details of any less intrusive policy measures considered, as well as all relevant procedural and other safeguards intended to apply to the proposed measure.

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2 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 17 of the ICCPR.

4 Parliamentary Joint Committee on Human rights, *Third Report of 2013*, pp 14-15.

1.38 The committee notes that the explanatory memorandum for the bill provides a description of the intended operation of the proposed fit and proper person test in relation to EMDG consultants,[5] including that:

- criteria for determining whether a person or an associate of the person is not a fit and proper person, and whether a person is an associate of an EMDG consultant, will be prescribed by legislative instrument (and based on the current Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004);
- the CEO of Austrade will be able to seek relevant information from a person or their associate to assist in forming an opinion as to whether a person is not a fit and proper person;
- an excluded EMDG consultant may apply for the revocation of a determination that they are not a fit and proper person (known as administrative review); and
- an excluded EMDG consultant may also apply to have the decision reviewed by the Administrative Appeals Tribunal (known as merits review).

1.39 The committee notes that these aspects of the bill appear relevant to an assessment of the bill's compatibility with the right to privacy and reputation. However, as the statement of compatibility does not assess the bill's compatibility with the right to privacy and reputation, the committee is unable to form a view on the bill's overall compatibility with human rights.

1.40 The committee further notes that concerns in relation to the operation of the fit and proper person test were raised in its consideration of the earlier and related Export Market Development Grants Amendment Bill 2013,[6] which established the test as a basis for non-payment of a grant to person or an associate of the person.[7] The current bill effectively seeks to extend the application of the test to EMDG consultants in their own right (such as in circumstances where an EMDG consultant engages in false or misleading behaviour).[8]

**1.41 The committee intends to write to the Minister for Trade and Investment to seek further information on the compatibility of the bill with the right to privacy and reputation, particularly the justification for the fit and proper person measure, including:**

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5 Explanatory memorandum, pp 3-5.

6 Parliamentary Joint Committee on Human rights, *Third Report of 2013*, pp 14-15.

7 Explanatory memorandum, p 5.

8 Explanatory memorandum, p 6.

- **whether it is to be imposed in pursuit of a legitimate objective;**
- **whether it is both necessary and proportionate to achieving that objective, including all relevant procedural and other safeguards; and**
- **details of any less intrusive policy measures that may have been available or were considered in the development of this measure.**

# Native Title Amendment (Reform) Bill 2014

*Sponsor: Senator Siewert*
*Introduced: Senate, 4 March 2014*

## Summary of committee concerns

1.42 The committee draws Senator Siewert's attention to the consideration of 'special measures' in its *Eleventh Report of 2013*. The committee also seeks further information in relation to the provisions dealing with agreements to disregard prior extinguishment of native title.

## Overview

1.43 This bill proposes to amend the *Native Title Act 1993* to:

- provide for the right to negotiate provisions of the Native Title Act to apply to offshore areas;
- strengthen and clarify the meaning of negotiations in good faith in relation to the right to negotiate provisions in the Native Title Act;
- provide for extinguishment over nature reserves including national parks to be disregarded, and for extinguishment to be disregarded by agreement;
- insert a presumption of continuity in relation to the observance of traditional laws and customs; and
- expressly provide that native title rights and interests may be of a commercial nature.

1.44 The explanatory memorandum states that the proposed measures are reforms that were promoted 'for a number of years by relevant stakeholders, most notably in submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment Bill 2009 and the 2009 Native Title Report from the Aboriginal and Torres Strait Islander Social Justice Commissioner'.

## Compatibility with human rights

### *Statement of compatibility*

1.45 The bill is accompanied by a statement of compatibility that states that the bill advances the human rights of Aboriginal and Torres Strait Islander peoples by promoting the right to culture,[1] and the right to equality and non-discrimination.[2]

1 Article 27 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 2(1) of the ICCPR; article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The statement of compatibility notes that the bill also promotes the land-related rights outlined in the UN Declaration of the Rights of Indigenous Peoples.[3]

1.46 The statement's overall assessment is that the regulation is compatible with human rights because it is a special measure designed to secure to Aboriginal people the full and equal enjoyment of human rights and fundamental freedoms.

***Committee view on compatibility***

*Right to self-determination*

1.47 The committee notes that, in addition to the rights mentioned in the statement of compatibility, the bill also engages and promotes the right to self-determination guaranteed by articles 1 of the ICCPR and the ICESCR and which provides the right of all peoples to 'freely determine their political status and freely pursue their economic, social and cultural development.' This is a collective right and, in the Australian context, is particularly relevant to Aboriginal and Torres Strait Islander peoples.

*Special measures*

1.48 The committee notes that the statement of compatibility categorises these amendments as 'special measures' within the meaning of article 1(4) of the ICERD.

1.49 In its *Eleventh Report of 2013* our predecessor committee considered the *Stronger Futures in the Northern Territory Act 2012* and related legislation. In its report the committee considered the classification of measures as 'special measures' within the meaning of the ICERD.

1.50 The committee's consideration of the criteria to be satisfied in order for a measure to be characterised as a 'special measure' is set out at pages 21 to 31 of that report. In particular, the committee noted that, as a matter of international law (including under the ICERD), measures based on race or ethnicity do not invariably amount to discrimination that can only be considered legitimate if they can be justified as 'special measures'. The relevant question is whether there is an objective and reasonable justification for the differential treatment. Under international law, the recognition of the traditional land rights of Indigenous peoples and legislative structures to give effect to those rights are generally considered to be non-discriminatory; such measures are not 'special measures' within the meaning of the ICERD. The committee noted that there was a difference between international law and Australian law in this regard, as represented by the High Court's interpretation of the *Racial Discrimination Act 1975*.[4]

3 Articles 25-29.

4 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, 27 June 2013, pp 29-31.

1.51 The committee expressed concern 'at the tendency for explanatory memoranda to invoke the category of 'special measures' as a justification for legislation that involves differential treatment based on race or ethnic origin, without sufficient analysis of whether the differential treatment may be justified as legitimate differential treatment based on reasonable and objective criteria.'[5]

*Agreements to disregard prior extinguishment*

1.52 The bill provides that at any time prior to a native title determination the applicant and a government party may make an agreement that the extinguishment of native title rights and interests are to be disregarded.[6]

1.53 It is not clear whether other persons whose interests may be affected would be consulted or notified before native title is agreed to be revived. Neither the statement of compatibility nor the explanatory memorandum addresses this issue.

**1.54 The committee intends to write to Senator Siewert to seek clarification whether the proposals in relation to agreements to disregard prior extinguishment could adversely impact on other persons whose interests may be affected.**

5 Parliamentary Joint Committee on Human Rights*, Eleventh Report of 2013*, p 28.

6 Proposed new section 47D, inserted by item 13, Schedule 1.

# Qantas Sale Amendment Bill 2014

*Portfolio: Infrastructure and Regional Development*
*Introduced: House of Representatives, 6 March 2014*

## Summary of committee concerns

1.55 The committee seeks further information as to the likely impact of the bill on the right to work.

## Overview

1.56 This bill proposes the removal of various restrictions imposed on Qantas by the *Qantas Sale Act 1992*, as well as making amendments to the *Air Navigation Act 1920*. The bill proposes the repeal of sections of the Qantas Sale Act which require certain restrictions to be included in Qantas' articles of association to limit foreign ownership and impose other related restrictions, as well as compliance and enforcement measures to ensure Qantas abides by these requirements. The purpose of the bill is to place Qantas on an equal footing with other airlines by removing the foreign ownership and other restrictions on its business.

1.57 In particular, the bill proposes the repeal of Part 3 of the Qantas Sale Act. Part 3 includes the following:

> **7 Qantas' articles of association to include certain provisions**
>
> (1) The articles of association of Qantas must, on and from the day on which Qantas first becomes aware that a person, other than the Commonwealth or a nominee of the Commonwealth, has acquired voting shares in Qantas:
>
> …
>
> (h) require that of the facilities, taken in aggregate, which are used by Qantas in the provision of scheduled international air transport services (for example, facilities for the maintenance and housing of aircraft, catering, flight operations, training and administration), the facilities located in Australia, when compared with those located in any other country, must represent the principal operational centre for Qantas ….

1.58 The same section also provides: that the articles of association of Qantas must require that the company's head office always be located in Australia; that at least two-thirds of the directors of Qantas be Australian citizens; that the director presiding at a meeting of the board of directors of Qantas be an Australian citizen; and that Qantas must not take any action to become incorporated outside Australia.

## Compatibility with human rights

### *Statement of compatibility*

1.59 The bill is accompanied by a statement of compatibility that refers to rights to work in the International Covenant on Economic, Social and Cultural Rights (ICESCR). It states:

> [t]he amendments proposed by this Bill to the QSA and ANA do not engage any of the applicable rights or freedoms. The Bill simply ensures Qantas is subject to the same regulatory framework as other Australian airlines.
>
> The Bill will give Qantas greater flexibility in its business structures. These opportunities will be consistent with the opportunities available to other Australian airlines, and the Bill will not impact Australia's broader workplace relations regulatory framework. The Bill will therefore not impact on human rights relating to employment under articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights.[1]

### *Committee view on compatibility*

*Right to work*

1.60 The committee considers that rights relating to work are relevant. The committee notes that one of Australia's obligations under the ICESCR is to fulfil the enjoyment of the right to work by promoting conditions in which persons can find work in Australia. The committee recognises that there is much contention over the appropriate role for government in relation to expanding job opportunities and that the impact of specific policies and measures may be hard to predict with certainty. The committee considers that an assessment of the compatibility of the bill with the ICESCR should have included some assessment of whether and how the bill might affect employment opportunities in Australia.

**1.61 The committee intends to write to the Minister for Infrastructure and Regional Development to seek further information as to:**

- **whether the bill is likely to limit the right to work;**
- **whether the government undertook any analysis of the likely impact on the right to work of the repeal of Part 3 of the *Qantas Sale Act 1992* and, if so, what the results of that analysis were; and**
- **if the bill is likely to limit the right to work, whether that limitation is compatible with Australia's obligations under the ICESCR.**

1 Statement of compatibility, p 2.

# Quarantine Charges (Imposition-General) Bill 2014

# Quarantine Charges (Imposition-Customs) Bill 2014

# Quarantine Charges (Imposition-Excise) Bill 2014

# Quarantine Charges (Collection) Bill 2014

*Portfolio: Agriculture*
*Introduced: House of Representatives, 6 March 2014*

## Summary of committee concerns

1.62 The committee seeks further information on the compatibility of a number of measures in the Quarantine Charges (Collection) Bill 2014 with the right to privacy, the right to freedom of movement, and the right to a fair hearing.

## Overview

1.63 The Quarantine Charges (Collection) Bill 2014 (the bill) forms part of a legislative package intended to re-align Australia's biosecurity and quarantine imports system with an efficient and effective cost-recovery model, consistent with the *Australian Government Cost-Recovery Guidelines*.

1.64 The bill provides the authority to collect charges which are proposed to be imposed by the Quarantine Charges (Imposition–General) Bill 2014, the Quarantine Charges (Imposition–Excise) Bill 2014 and the Quarantine Charges (Imposition–Customs) Bill 2014. The bill includes a number of measures to:

- provide that regulations may be made to determine the manner in which quarantine charges are to be paid;
- provide the Commonwealth with powers to refuse service to a person liable to a charge or late payment fee, and to suspend or revoke permits;
- provide for enforcement powers to deal with goods and vessels to recover unpaid charges and late payment fees, to make directions in relation to any such goods and vessels (with a related offence for engaging in conduct that contravenes a direction) and to sell goods and vessels to recover outstanding debts;
- provide the Commonwealth with the power to deal with goods and vessels that are abandoned or forfeited; and
- provide for the remitting or refunding of fees in exceptional circumstances.

## Compatibility with human rights

### *Statement of compatibility*

1.65 The bill is accompanied by a statement of compatibility which states that the bill engages the right to privacy,[1] the right to freedom of movement,[2] the right to liberty (including the prohibition against arbitrary detention)[3] and the right to work and rights in work.[4]

1.66 The statement of compatibility concludes that the bill is compatible with the human rights and that, to the extent that the bill may limit human rights, those limitations are reasonable, necessary and proportionate to achieve the legitimate objective of the bill.[5]

### *Committee view on compatibility*

*Right to privacy*

1.67 In relation to the right to privacy, the statement of compatibility notes that Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy. However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

1.68 The committee notes that existing enforcement powers in Part VIA of the *Quarantine Act 1908* (Enforcement) are applied to the bill (proposed section 41). The statement of compatibility advises that the application of Part VIA is intended to protect 'the ability of the Commonwealth to collect quarantine charges when they are due and payable'.[6] While these enforcement provisions are recognised as engaging the right to privacy, the statement of compatibility notes:

- the powers would only be available to officers with the appropriate training, expertise and authority;

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1 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 12 of the ICCPR.

3 Article 9 of the ICCPR.

4 Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights.

5 Statement of compatibility, p 9.

6 Statement of compatibility, p 6.

- many of the powers contain a test of reasonableness such that the powers would be exercised only when a quarantine officer believes it is reasonable to do so; and
- the enforcement provisions would be required to be exercised in compliance with the *Privacy Act 1988*.[7]

1.69 While the committee notes that the above factors appear relevant to an assessment of the compatibility of the bill with the right to privacy, it notes that there is no information provided as to the specific powers contained in Part VIA of the Quarantine Act, or their engagement and compatibility with human rights in the context of their application to the bill. The committee's usual expectation is that, where a bill seeks to incorporate the provisions of another Act, the statement of compatibility identifies the substantive elements of the incorporated provisions, and their potential engagement and compatibility with human rights.

**1.70 The committee intends to write to the Minister to seek further information on the compatibility of Part VIA of the *Quarantine Act 1908*, as applied in the context of the bill, with the right to privacy.**

*Right to freedom of movement*

1.71 In relation to the right to freedom of movement, the statement of compatibility notes that Article 12 of the ICCPR includes the right to move freely within a country for those lawfully within the country, the right to leave any country and the right of citizens to enter a country. The right may be restricted in certain circumstances, including where the objective of the restriction is to protect national security, public order, public health or morals or the rights and freedoms of others. However, any such restriction must be necessary and proportionate to protect the purpose for which it is imposed, and should be as least intrusive as possible to achieve that purpose.[8]

1.72 The statement of compatibility identifies the proposed power of the Director of Quarantine to detain a vessel the subject of a charge (proposed section 24) as engaging the right to freedom of movement, insofar as the detention of a vessel may restrict the movement of individuals relying on that vessel to move.[9] However, it is anticipated that the detention of non-commercial vessels would be 'extremely rare', and that it would accordingly be 'highly unlikely' that an individual's freedom of movement would be affected.[10] The measure is therefore characterised as necessary

7 Statement of compatibility, p 6.

8 Statement of compatibility, pp 6-7.

9 Statement of compatibility, p 7.

10 Statement of compatibility, p 7.

to enforce the Commonwealth's capacity to recover costs for the services that it has provided, and proportionate to the potential risk to the Commonwealth's ongoing capacity to provide biosecurity and quarantine services.

1.73 As set out above, the bill applies Part VIA of the Quarantine Act (proposed section 41). These enforcement provisions are recognised as engaging the right to freedom of movement, with the statement of compatibility noting:

- the powers would only be available to officers with the appropriate training, expertise and authority; and
- many of the powers contain a test of reasonableness such that the powers would be exercised only when a quarantine officer believes it is reasonable to do so.

1.74 While the committee notes that the above factors appear relevant to an assessment of the compatibility of the bill with the right to freedom of movement, it notes that there is no information provided as to the specific powers contained in Part VIA of the Quarantine Act, or their engagement and compatibility with human rights in the context of their application to the bill. The committee's usual expectation is that, where a bill seeks to incorporate the provisions of another Act, the statement of compatibility identifies the substantive elements of the incorporated provisions, and their potential engagement and compatibility with human rights.

**1.75 The committee intends to write to the Minister to seek further information on the compatibility of Part VIA of the Quarantine Act (Enforcement), as applied in the context of the bill, with the right to freedom of movement.**

*The right to a fair hearing*

1.76 Proposed new section 14 of the bill provides for the power to suspend or revoke a number of approvals or authorisations made under the Quarantine Act where a person has not paid a quarantine charge or late payment fee which is due and payable. As set out in the statement of compatibility, this measure may have implications for the right to work.[11] The committee notes that a decision to suspend or revoke a permit under proposed section 14 will not be subject to merits review (although judicial review will be available).[12]

11 Statement of compatibility, p 8.

12 Explanatory memorandum, p 13.

1.77 In the committee's view, the non-availability of merits review for decisions under proposed section 14 engages the right to a fair hearing, which provides that in the determination of rights and obligations, a person is entitled to a fair and public hearing by a competent, independent and impartial tribunal. [13]

1.78 The non-availability of merits review is justified in the explanatory memorandum accompanying the bill on the basis that, as the Quarantine Act does not contain merits review mechanisms, it would be inappropriate to provide for such review mechanisms in the bill.[14]

1.79 While the committee accepts that there may be some administrative or regulatory benefits to a degree of conformity between aspects of the bill and the Quarantine Act, there is insufficient information in the statement of compatibility to allow an assessment of whether preclusion of merits review is consistent with the right to a fair hearing in this case. The committee notes that the fact that a particular approach is or is not taken in a primary Act or elsewhere is not in and of itself a sufficient reason for justifying limitations on rights.

**1.80 The committee intends to write to the Minister for Agriculture to seek further information on the compatibility of the bill with the right to a fair hearing, particularly the justification for the non-availability of merits review for a decision under proposed section 14, including:**

- **why it is necessary to preclude merits review for such decisions; and**
- **how preclusion of merits review in relation to such decisions is proportionate to achieving a legitimate objective, including all relevant procedural and other safeguards, and details of any less restrictive policy measures that may have been available or were considered in the development of the bill.**

*Right to a fair trial – presumption of innocence*

1.81 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

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13 Article 14 of the ICCPR.

14 Explanatory memorandum, p 13.

1.82 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

1.83 The committee notes that the bill proposes to introduce two new offences for moving or interfering with withheld goods[15] and moving or interfering with a detained vessel.[16] Both of these offences set out an exception for where a person is authorised to engage in the conduct under the proposed new Act, the Quarantine Act or under another Australian law. In both cases, the defendant bears an evidential burden in relation to whether their conduct is authorised.[17]

**1.84 The committee considers that the use of reverse burdens as proposed by the bill is unlikely to raise issues of incompatibility with the presumption of innocence. In particular, the burdens placed on the defendant are evidential burdens only (as opposed to a legal burden) and relate to matters that appear to be likely to be within the defendant's knowledge.**

**1.85 However, the committee emphasises its expectation that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable it to assess their compatibility. This includes identifying and providing justification where a reverse burden of proof is imposed.**

15 See proposed new section 19 of the bill.

16 See proposed new section 25 of the bill.

17 See proposed new section 19(2) and proposed new section 25(2).

# Bills unlikely to raise human rights concerns

## Civil Aviation Amendment (CASA Board) Bill 2014

*Portfolio: Infrastructure and Regional Development*
*Introduced: House of Representatives, 6 March 2014*

1.86 This bill proposes to amend the *Civil Aviation Act 1988* to increase the size of the Civil Aviation Safety Authority (CASA) Board to a total of six members. The bill allows for the appointment of two additional Board members with technical and/or operational aviation experience to increase the depth of knowledge and skills on the Board.[1] The bill also makes two minor amendments to increase the number of Board members required to constitute a quorum at a Board meeting and increases the number of Board members required to initiate an ad hoc Board meeting.[2]

1.87 The bill is accompanied by a statement of compatibility which states that it promotes the right to work[3] and engages rights at work.[4]

**1.88 The committee considers that the bill does not appear to give rise to human rights concerns.**

1 Explanatory memorandum, p 1.

2 Statement of compatibility, p 2.

3 Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4 Article 7 of the ICESCR.

# Commonwealth Electoral Amendment (Reducing Barriers for Minor Parties) Bill 2014

*Sponsor: Senator Rhiannon*
*Introduced: Senate, 4 March 2014*

1.89 This bill proposes to amend the *Commonwealth Electoral Act 1918* to reverse the increase in nomination fees that occurred as a result of the *Electoral and Referendum Amendment (Improving Electoral Procedure) Act 2013*, passed in February 2013.[5] The nomination fee for a Senator will be $1000 (currently $2000); or $500 (currently $1000) for a member of the House of Representatives.

1.90 The purpose of the bill is to 'reduce registration fees for individuals and minor parties that want to participate in Commonwealth elections'.[6]

1.91 The bill is accompanied by a statement of compatibility that states that the bill promotes the right to take part in elections[7] 'by reducing barriers to political participation for those seeking to be elected'.[8]

**1.92 The committee considers that the bill does not appear to give rise to human rights concerns.**

5 Explanatory memorandum, p 1.

6 Explanatory memorandum, p 1.

7 Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

8 Statement of compatibility, p 1.

# Competition and Consumer Amendment (Misuse of Market Power) Bill 2014

*Sponsor: Senator Xenophon*
*Introduced: Senate, 6 March 2014*

1.93 This bill proposes to amend the *Competition and Consumer Act 2010* to provide the Court with the power to give directions to order a corporation to reduce its market share where the corporation has been found to have contravened sections 46(1) or 46(1AA) of the Act in relation to misuse of market power. The bill allows the Court to direct a corporation to reduce its market share within two years of the order being made on the application of the Australian Competition and Consumer Commission or any other person.[9]

1.94 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[10]

**1.95 The committee considers that the bill does not appear to give rise to human rights concerns.**

9 Explanatory memorandum, p 2.

10 Statement of compatibility, p 4.

# Farm Household Support Bill 2014

# Farm Household Support (Consequential and Transitional Provisions) Bill 2014

*Portfolio: Agriculture*
*Introduced: House of Representatives, 6 March 2014*

1.96 The Farm Household Support Bill 2014 (the main bill) seeks to introduce the Farm Household Allowance (FHA), a new income support payment for farmers and their partners who are in financial hardship. It replaces the existing Exceptional Circumstances Relief Payment (ECRP), which is only available to farmers in regions experiencing exceptional circumstances, such as drought. The FHA will provide up to three cumulative years of income support for farmers and their partners based on individual need without the need for a climatic trigger. Its purpose is to support farm families in hardship and help farmers prepare for and manage business risks, including drought. According to the explanatory memorandum, the bill aligns the proposed new income support payment with social security laws where possible.[11]

1.97 Under the main bill, for a person to qualify for the payment, they must satisfy certain participation requirements, including:

- Meeting a *means test*, composed of an asset and income test. The bill proposes an assets test that is higher than mainstream asset limits in recognition of the fact that farm assets are relatively illiquid compared with other types of business assets.
- Entering into, and complying with, a *financial improvement agreement*. Such agreements will require the person to undertake approved activities such as education, training, or off-farm employment, designed to improve their capacity for self-reliance.
- Having a *farm financial assessment* conducted to evaluate options to improve the person's financial situation and inform the development of the financial improvement agreement.

1.98 The main bill proposes activity and farm financial assessment supplements for the purpose of funding partially or wholly the above requirements. It also provides ancillary benefits where certain requirements are met.[12]

1.99 The Farm Household Support (Consequential and Transitional Provisions) Bill 2014 (consequentials bill) repeals the *Farm Household Support Act 1992*, which currently provides for the ECRP and makes necessary consequential amendments. One such amendment has the effect of continuing the current exemption from the

11 Explanatory memorandum, p 4.

12 This includes benefits such as a health care card, telephone allowance and rent assistance.

*Age Discrimination Act 2004* in relation to things done in direct compliance with the 1992 Act in relation to the proposed new Act. This exemption is limited to provisions which allow for differential treatment based on age (for example, the requirement that a person must be 16 years or above to receive the FHA).

1.100 The bills are accompanied by self-contained detailed statements of compatibility. The statement accompanying the main bill states that the bill engages the right to social security, the right to an adequate standard of living, the right to health, protection of the family, the right to work and rights in work, the right to privacy and the right to equality and non-discrimination. The statement accompanying the consequentials bill states that the bill engages the right to social security, the right to an adequate standard of living, the right to health, the right to work and rights in work, and the right to equality and non-discrimination. Both statements of compatibility conclude that the bills are compatible with human rights, in that to the extent that they may limit rights, the limitations are reasonable, necessary and proportionate to achieve legitimate aims.

1.101 The committee considers that the statements of compatibility contain a detailed and thorough examination of the rights implications of the bills, including sufficient justification for any limitations on rights, with one exception set out below.

1.102 The committee notes that the main bill requires entry into, and compliance with, a financial improvement agreement in order for a person to receive FHA. Accordingly, a failure to comply with certain activity requirements set out in the agreement may result in the ceasing of payments. The right to social security encompasses the right to access and maintain benefits to secure protection from, among other things, lack of work-related income. The statement of compatibility does not address how the imposition of certain activity requirements is consistent with the right to social security, particularly where a person may have a legitimate reason for not being able to meet the requirements at a given time. However, the committee notes that Division 5 of Part 2 of the main bill sets out the conditions under which an individual can be temporarily exempt from the activity test, including, for example, where it is unreasonable to expect the person to satisfy the activity test. The committee considers that it would have been helpful if the statement of compatibility had addressed this issue.

**1.103 In light of the information set out in the statement of compatibility, and the above view, the committee considers that the bills do not appear to give rise to human rights concerns.**

**1.104 The committee recommends the government monitor the operation and impact of the measures. The committee will seek to ensure that the measures are operating as intended in 12 months' time.**

# Flags Amendment Bill 2014

*Sponsor: Senator Xenophon and Senator Madigan*
*Introduced: Senate, 6 March 2014*

1.105 This bill proposes to amend the *National Flag Act 1953* to require that Australian flags flown, used or supplied by the Commonwealth are only manufactured in Australia from Australian materials.[13]

1.106 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[14]

**1.107 The committee considers that the bill does not appear to give rise to human rights concerns.**

13 Explanatory memorandum, p 2.

14 Statement of compatibility, p 3.

# National Broadband Network Companies Amendment (Tasmania) Bill 2014

*Sponsor: Senator Urquhart*
*Introduced: Senate, 5 March 2014*

1.108 This bill proposes to amend the *National Broadband Network Companies Act 2011* to require NBN Co to only make fixed line connections to the NBN in Tasmania using fibre to the premises.

1.109 This bill is accompanied by a statement of compatibility which states it promotes the right of everyone to an adequate standard of living[15] and to continuous improvement of living conditions. The statement concludes that the provision of the best available high speed broadband creates opportunities to grow the Tasmanian economy and improve the delivery of health, education and aged care services.[16]

1.110 The committee notes that the bill may also be considered to promote the right to freedom of expression, which encompasses the right to both receive and impart information in any medium.[17]

**1.111 Provided that there are no technical impediments to the connection of optical fibre to all premises in Tasmania, the committee considers that the bill does not appear to give rise to human rights concerns.**

15 Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

16 Statement of compatibility, p 4.

17 Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

# Social Security Amendment (Caring for People on Newstart) Bill 2014

*Sponsor: Senator Siewert*
*Introduced: Senate, 6 March 2014*

1.112 This bill proposes to provide additional financial assistance to Newstart and Youth Allowance recipients by:

- increasing the single rates of Newstart by $50 a week;
- increasing the single independent rates of Youth Allowance by $50 a week; and
- providing the same indexation arrangement for certain pensions and allowances, being the higher of the Consumer Price Index (CPI), Male Total Average Weekly Earnings (MTAWE) or pensioner and beneficiary living cost index amount.[18]

1.113 The bill is accompanied by a statement of compatibility that states that it promotes the right to social security[19] by increasing the amount of financial support for certain recipients of Newstart and Youth Allowance.[20]

**1.114 The committee considers that the bill does not appear to give rise to human rights concerns.**

18 Explanatory memorandum, p 1.

19 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

20 Statement of compatibility, p 1.

# Trade and Foreign Investment (Protecting the Public Interest) Bill 2014

*Sponsor: Senator Whish-Wilson*
*Introduced: Senate, 5 March 2014*

1.115 The purpose of this bill is to prevent the Commonwealth from entering into an agreement with one or one more foreign countries that includes investor-state dispute settlement provisions.[21]

1.116 The bill is accompanied by a statement of compatibility that states that the bill does not engage any of the applicable rights or freedoms and 'is compatible with human rights as it does not raise any human rights issues.'[22]

**1.117 The committee considers that the bill does not appear to give rise to human rights concerns.**

21 Explanatory memorandum, p 2.

22 Statement of compatibility, p 2.

# The committee has deferred its consideration of the following bill

## Fair Work Amendment Bill 2014

*Portfolio: Employment*
*Introduced: House of Representatives, 27 February 2014*

### Overview

1.118 The committee deferred its consideration of this bill in its *Third Report of the 44th Parliament* which tabled on 4 March 2014.[1]

1.119 This bill seeks to amend the *Fair Work Act 2009* to implement elements of the *Coalition's Policy to Improve the Fair Work Laws*, including to respond to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012) review into the operation of the Fair Work Act by the Fair Work Review Panel.

1.120 The bill proposes a range of measures, including changes to the right of entry framework, new processes relating to the negotiation of single-enterprise greenfields agreements, changes to rules around individual flexibility arrangements, and a number of other measures implementing recommendations of the Fair Work Review Panel.

1.121 On 6 March 2014, the Senate referred the provisions of the bill to the Senate Education and Employment Legislation Committee for inquiry and report by 5 June 2014.

**1.122 The committee considers that the bill may give rise to human rights concerns. It has therefore decided to further defer its consideration of this bill to allow for the closer examination of the issues and the opportunity to take into account submissions made to the Senate Education and Employment Legislation Committee inquiry.**

1 Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament*, p 39.

# Part 2

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# Legislative instruments received
# 22 – 28 February 2014

# Consideration of legislative instruments

2.1 The committee considered 49 legislative instruments received between 22 and 28 February 2014. All 49 instruments did not appear to raise any human rights concerns and were accompanied by adequate statements of compatibility.

2.2 The full list of instruments considered by the committee can be found at Appendix 1 of this report.

# Part 3

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# Responses to the committee's comments on bills and legislative instruments

# Consideration of responses

## Criminal Code Amendment (Harming Australians) Bill 2013

*Sponsor: Senator Xenophon*
*Introduced: Senate, 11 December 2013*
*Status: Before Senate*
*PJCHR comments: Second Report of 44th Parliament, tabled 11 February 2014*
*Response dated: 5 March 2014*

### Information sought by the committee

3.1 The *Criminal Code Amendment (Offences Against Australians) Act 2002* (the 2002 Act) inserted a new Division 104 (Harming Australians) into the *Criminal Code Act 1995*. This established new offences of murder, manslaughter, and the intentional or reckless infliction of serious harm on Australian citizens or residents abroad. The 2002 Act commenced operation on 14 November 2002 but operated retrospectively, with effect from 1 October 2002. The current bill seeks to extend the retrospective application of these offences so that they apply to acts which occur any time before, on or after the commencement of the offences.

3.2 In addition to seeking further clarification from Senator Xenophon in relation to the bill, the committee also indicated it would welcome information from the Attorney-General, as the Minister responsible for the Criminal Code, on the rationale behind the retrospective application of the existing offences and on the compatibility of the existing offences with the prohibition in article 15 of the International Covenant on Civil and Political Rights (ICCPR), to inform the committee's examination of the current bill.

3.3 The Attorney-General's Department's response it attached.

### Committee's response

3.4 The committee thanks the Attorney-General and his Department for their response.

**3.5 The committee intends to write to Senator Xenophon to draw his attention to the Attorney-General's Department's response.**

3.6 The committee has concerns about the retrospective operation of the original bill, as well as the further retrospective application proposed by this bill.

3.7 Article 15(1) of the ICCPR prohibits retrospective criminal laws. However, as the Department’s response notes, article 15(2) of the ICCPR permits the retrospective application of national criminal laws in relation to ‘any act or omission

which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.' This exception is generally understood as referring to acts which are recognised as constituting international crimes at the time they are committed and includes, for example, genocide and crimes against humanity.

3.8 The explanatory memorandum to the 2002 bill did not explicitly assess the compatibility of the proposed retrospective operation of the bill with article 15(2) of the ICCPR. In a passage quoted in the Departmental response to the committee's comments on the present bill,[1] the explanatory memorandum justified the retrospective operation of the 2002 bill in the following terms:

> Whilst retrospective offences are generally not appropriate, retrospective application is justifiable in these circumstances because the conduct which is being criminalised - causing death or serious injury - is conduct which is universally known to be conduct which is criminal in nature. These types of offences are distinct from regulatory offences which may target conduct not widely perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[2]

3.9 The suggestion that criminal laws may operate retrospectively in relation to conduct 'which is universally known to be conduct which is criminal in nature' goes beyond what is permitted under article 15(2), if that category is intended to include acts which are not accepted as crimes under international law. This appears to be the case under both the 2002 provisions and this bill. Murder, manslaughter and the infliction of serious harm are not, without more, international crimes, even though they are crimes under the ordinary criminal law of most, if not all, countries.

3.10 To the extent the government may wish to argue that it was permissible to legislate retrospectively in relation to such offences where they were committed as part of a terrorist activity, the government would have to demonstrate that as of 2002, the relevant acts of terrorism amounted to international crimes, not just crimes under domestic law. Neither the 2002 explanatory memorandum nor the Departmental response explores this issue, and the legislation does not appear to be drafted on this basis. In any event, it is not clear that such acts of terrorism would in 2002 have amounted to international crimes.

**3.11 The committee intends to defer its final consideration of this bill pending receipt of a response from Senator Xenophon. The committee intends to write to the Attorney-General to draw his attention to its interim comments.**

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1 At paragraph 13.

2 Explanatory memorandum, p 2 (note on clause 2).

Australian Government
Attorney-General's Department

MC14/04327



Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the Parliamentary Joint Committee on Human Rights' *Second Report of the 44th Parliament* tabled on Tuesday 11 February 2014 which reviewed, amongst other bills, the Criminal Code Amendment (Harming Australians) Bill 2013. You have sought the Attorney-General's clarification on a number of matters set out in this report. Your correspondence has been forwarded to the Department for reply.

Please find attached the Department's submission addressing these matters.

The action officer for this matter is Elise Perry who can be contacted on (02) 6141 3032.

Yours sincerely

Iain Anderson
First Assistant Secretary
Criminal Justice Division

- 5 MAR 2014

**Australian Government**

**Attorney-General's Department**

**Criminal Justice Division**

Parliamentary Joint Committee on Human Rights

# Criminal Code Amendment (Harming Australians) Bill 2013

## Attorney-General's Department submission

**February 2014**

## Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Parliamentary Joint Committee on Human Rights with this submission as part of the Committee's examination of the Criminal Code Amendment (Harming Australians) Bill 2013 (the Bill).

2. The Bill was introduced as a private senator's bill into the Senate by Senator Nick Xenophon on 11 December 2013. Schedule 1 of the Bill seeks to amend the Harming Australians provisions found in Division 115 in Schedule 1 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) to allow the offences of murder, manslaughter and the causing of intentional or reckless serious harm committed against Australians overseas to have effect before, on or after the date of commencement.

3. The *Criminal Code Amendment (Offences Against Australians) Act 2002* (the Offences Against Australians Act), which enacted these Harming Australians provisions, was granted Royal Assent on 15 November 2002, however commenced retrospectively with effect from 1 October 2002, approximately six weeks prior to their enactment.

4. The Parliamentary Joint Committee on Human Rights has sought the views of the Attorney-General's Department on the rationale behind this retrospective application of the existing offences and on the compatibility of the existing offences with the prohibition in article 15 of the *International Covenant on Civil and Political Rights* (ICCPR).

### Commonwealth criminal law policy regarding retrospectivity

5. The Federal Parliament and successive Australian Governments have only endorsed retrospective criminal offences in very limited circumstances. Exceptions have been made on a case by case basis and only where there has been a strong need to address a gap in existing offences, and the moral culpability of those involved means there is no substantive injustice in retrospectivity.

6. The basis of this position is that people are entitled to regulate their affairs on the assumption that conduct which is not currently a crime will not be made a crime retrospectively through backdating criminal offences. This accords with Australia's obligations under article 15 of the ICCPR. Article 15(1) provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

7. Article 15(2) provides that the prohibition contained in article 15(1) does not apply if the relevant act was criminal at the time it was committed 'according to the general principles of law recognised by the community of nations'.

### The retrospective application of the existing offences

8. Division 115 of the Criminal Code provides that any person may be prosecuted in Australia for:

- murder of an Australian citizen or resident outside Australia (section 115.1)

- manslaughter of an Australian citizen or resident outside Australia (section 115.2), or
- intentionally or recklessly causing serious harm to an Australian citizen or resident outside Australia A (section 115.3 and section 115.4).

9. These offences were granted Royal Assent on 14 November 2002, but were given very limited retrospective operation to commence on 1 October 2002.

10. The justification for these offences, as stated in the Explanatory Memorandum for the Offences Against Australians Act, was to 'provide coverage for overseas attacks on Australian citizens and residents'. These were designed to 'complement the existing terrorism legislation' by providing a 'prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.'

11. The then Attorney-General, the Hon Daryl Williams QC MP, explained in the Second Reading Speech that this was necessary given that some countries 'may not have specific counter-terrorism laws, but they will have murder laws.' This new offence would 'fulfil the pre-condition for extradition that there is dual criminality and enable extradition for murder,' thus filling a gap in existing counter-terrorism legislation. As a result, the legislation would 'ensure there are no loopholes in terms of prosecuting terrorist acts involving murder overseas'.

12. The impetus for the introduction of these offences was the Bali Bombings, which occurred on 12 October 2002 and killed 202 people, including 88 Australians. To allow for the prosecution of the perpetrators of the Bali Bombings, the offences were given very limited retrospective operation to commence on 1 October 2002, only 45 days prior to the enactment of the Act.

13. This is compatible with article 15 of the ICCPR, as reflected in the Explanatory Memorandum to the Bill:

> Whilst retrospective offences are generally not appropriate, retrospective application is justifiable in these circumstances because the conduct which is being criminalised - causing death or serious injury - is conduct which is universally known to be conduct which is criminal in nature. These types of offences are distinct from regulatory offences which may target conduct not widely perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[1]

14. The scope of the prohibition in article 15 of the ICCPR also includes that laws must not impose greater punishments than those which would have been available at the time the acts were done. The penalties set out in the Offences Against Australians Act (namely 15 years imprisonment for recklessly causing serious harm, 20 years imprisonment for intentionally causing serious harm, 25 years for manslaughter and life imprisonment for murder) are comparable to similar crimes of murder and manslaughter in certain Australian State jurisdictions. As explained in the Explanatory Memorandum, these are maximum penalties and a judge has discretion to reduce these penalties where appropriate. The limitation of the retrospective period to only 45 days ensures that this obligation is able to be upheld by Australia and that any penalties imposed would not be greater than those available at the time the acts were commissioned.

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[1] Explanatory Memorandum, *Criminal Code Amendment (Offences Against Australians) Act 2002.*

**Conclusion**

15. The Government does not lightly pursue retrospective criminal laws and has only considered them where there are exceptional or special circumstances. The Offences Against Australians Act permitted a limited retrospective application of 45 days to address a potential gap with respect to dual criminality and offshore terrorist acts involving murder, and to capture the specific circumstances of the Bali Bombings.

# Customs Amendment (Record Keeping Requirements and Other Measures) Regulation 2013

*FRLI: F2013L01968*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 2 December 2013*
*PJCHR comments: Second Report of 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

## Information sought by the committee

3.12 The regulation prescribes the particulars that must be kept by Cargo Terminal Operators (CTOs) under subsection 102CE of the *Customs Act 1901* with regard to persons who enter cargo terminals. This requirement was inserted by the *Customs and Auscheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013*.

3.13 The committee sought further information as to the number of CTOs that are not subject to the privacy provisions of the *Privacy Act 1988* and the steps proposed to ensure the right to privacy of a person who provides personal information to a CTO which is not subject to the private sector provisions of the Privacy Act.

3.14 The Minister's response is attached.

## Committee's response

3.15 The committee thanks the Minister for his response.

3.16 The Minister notes that the Australian Customs and Border Protection Service (ACBPS) does not at present have access to information that 'would enable it to determine the number of CTOs that are not subject to the private sector provisions of the *Privacy Act 1988*'; and reiterated previous advice to the committee that very few, if any, CTOs would fall within the small business exception to the private sector provisions of the *Privacy Act 1988*. The ACBPS would, however, be able to develop a comprehensive list of CTOs subject to the record-keeping requirements of the *Customs and Auscheck Legislation Amendment* (*Organised Crime and Other Measures) Act 2013*, due to certain notification requirements on commencement of the changes. This list could provide a basis to seek further information from listed CTOs to determine their small business status.

3.17 In relation to the committee's inquiry as to whether any protections were proposed to ensure the right to privacy of a person who may provide personal information to a CTO not subject to the private sector provisions of the *Privacy Act 1988*, the Minister advised that 'there is no intention to impose any additional

privacy related controls on small businesses operating as CTOs who are not subject to those provisions'.

**3.18 The committee notes that the inability to determine the number of CTOs not subject to the private sector provisions of the *Privacy Act 1988* prevents a proper assessment of the extent to which the regulation may limit the right to privacy. The committee recommends that the notification requirements arising from the commencement of the changes be adapted to ensure that the number of CTOs not subject to the relevant provisions of the *Privacy Act 1988* can be identified in future. This capacity would support the development of future policy measures with reference to the right to privacy, and to human rights considerations more generally.**

**3.19 The committee also notes that, in the absence of any particular protections to ensure the right of privacy of a person who may provide personal information to a CTO not covered by the private sector provisions of the *Privacy Act 1988*, the committee is unable to conclude that the regulation is compatible with the right to privacy**.

***Customs Amendment (Record Keeping Requirements and Other Measures) Regulation 2013* [F2013L01968]**

The Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013 (the Organised Crime Act) received Royal Assent on 28 May 2013. It amends the Customs Act 1901 and the AusCheck Act 2007 to mitigate vulnerabilities at Australia's borders.

A key measure of the Organised Crime Act was to place statutory obligations on Cargo terminal operators (CTOs) and those that load and unload cargo, which were similar to those that the Customs Act imposes on holders of depot and warehouse licences.

As part of implementing the Organised Crime Act, it was necessary to prescribe certain matters in regulations. Section 102CE of the Organised Crime Act places an obligation on CTOs to keep records of each person who enters a terminal. This obligation does not apply to an employee of the CTO or an officer or employee of the Commonwealth, States or Territories.

The Customs Amendment (Record Keeping Requirements and Other Measures) Regulation 2013 amends the Customs Regulations 1926 to prescribe the details a CTO must keep to satisfy this obligation. These changes took effect on 28 November 2013.

How many Cargo Terminal Operators are not subject to the private sector provisions of the *Privacy Act 1988* and what steps are proposed to ensure the right to privacy of a person who provides personal information to a Cargo Terminal Operator who is not subject to the private sector provisions?

The Australian Customs and Border Protection Service (ACBPS) does not have access to information that would enable it to determine the number of CTOs that are not subject to the private sector provisions of the Privacy Act 1988. As noted in paragraph 2.2.6 of the Report, it is likely that very few, if any, CTOs would fall within the small business exception to the private sector provisions in the Privacy Act 1988.

New section 102C of the Customs Act 1901 requires that CTOs notify ACBPS of the cargo terminal within 90 days of the commencement of the changes contained in the Organised Crime Act (i.e. 26 February 2014). ACBPS officers have and will continue to deliver information sessions to CTOs on relevant legislative changes contained in the Organised Crime Act. Through section 102C of the Customs Act and the information sessions, ACBPS will develop a comprehensive list of CTOs subject to these legislative provisions.

The list of CTOs, once available, will not contain information that would allow ACBPS to identify those CTOs that are small businesses. ACBPS could subsequently request further information from the listed CTOs to determine small business status.

However, as noted at paragraph 2.2.6 of the Report, there is no intention to impose any additional privacy related controls on small businesses operating as CTOs who are not subject to private sector provisions of the Privacy Act 1988.

# Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

*Portfolio: Immigration and Border Protection*
*Introduced: House of Representatives, 4 December 2013*
*Status: Before Senate*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2013*
*Response dated: 28 February 2014*

## Background

3.20 This bill proposes to repeal the complementary protection provisions in the *Migration Act 1958* to enable the government to reinstate administrative processes to deal with complementary protection claims.[1]

3.21 The complementary protection provisions in the Migration Act were introduced in March 2012 to provide a statutory basis for implementing Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Non-refoulement obligations under these treaties require Australia not to return people, including those who do not fall within the Refugee Convention definition of a 'refugee', to a country where there is a real risk that they would face torture or other serious forms of harm, such as arbitrary deprivation of life; the death penalty; or cruel, inhuman or degrading treatment or punishment. These are absolute rights and may not be subject to any limitations.

3.22 As a result of the 2012 changes, claims raising Australia's non-refoulement obligations under the ICCPR and the CAT are considered as part of the primary protection visa assessment framework. Therefore, a protection visa may be granted on the basis that the applicant is a refugee as defined in the Refugee Convention or on the basis that non-refoulement obligations under the CAT and the ICCPR are owed to the person. Applicants claiming complementary protection have equivalent rights to independent merits review as those seeking protection under the Refugee Convention. A protection visa will be granted if the person is owed non-refoulement obligations and other visa requirements are met. If a person is granted a protection visa on complementary protection grounds, their family members are also eligible to receive protection visas, if they are part of the same application.

3.23 Prior to the 2012 changes, the Minister's personal and non-compellable intervention powers to grant a visa, predominantly on humanitarian grounds under section 417 of the Migration Act, provided the only option for people who engaged

1 The term 'complementary protection' refers to protection against refoulement (removal), which is additional to that provided by the 1951 Refugee Convention as amended by the 1967 Protocol (Refugee Convention).

Australia's non-refoulement obligations under the ICCPR or CAT but who did not meet the refugee criteria (and were therefore not eligible for a protection visa). The Minister's discretionary powers were enlivened only at the end of the refugee determination process and after the person had exhausted merits review.

## Information sought by the committee

3.24 The committee sought further information to determine whether the proposed repeal of the existing complementary protection legislation with a view to reinstating discretionary administrative processes was compatible with human rights.

3.25 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.

## Committee's response

3.26 The committee thanks the Minister for his response.[2]

## *Rights engaged*

3.27 The committee considered that the bill engaged the right to an effective remedy and non-refoulement obligations;[3] children and family rights;[4] the right not to be arbitrarily detained;[5] and the right to a fair hearing.[6]

3.28 The committee noted that the Migration Act currently provides for a statutory right of independent merits review for a decision to refuse a protection visa on complementary protection grounds. The committee noted that this bill will remove that right because a consequence of removing the complementary protection criterion as a basis for a protection visa grant is that such review will no longer be available.

3.29 The committee considered that the removal of an existing statutory right for independent merits review of non-refoulement decisions represented a limitation on the right to an effective remedy, which is a necessary aspect of satisfying Australia's non-refoulement obligations.

3.30 The committee also noted that the enactment of the complementary protection provisions in the Migration Act ensured the availability of review by an independent and impartial tribunal for decisions relating to Australia's non-

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2 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 10-20.

3 Article 2(3) in conjunction with articles 6 and 7 of the ICCPR; article 3 of the CAT.

4 Articles 17 and 23 of the ICCPR; articles 3(1), 10, 20 and 22 of the Convention on the Rights of the Child (CRC).

5 Article 9 of the ICCPR.

6 Article 14(1) of the ICCPR.

refoulement obligations, and, consequently, generally satisfied Australia's obligation under article 2(3) of the ICCPR to progressively develop judicial remedies. The committee therefore considered that the proposal to repeal the complementary protection provisions could also be considered to be a retrogressive measure.

3.31 The committee further noted that the amendments constituted limitations on the rights of children and the family, the right not to be arbitrarily detained and the right to a fair hearing as well.

3.32 The committee has consistently taken the view that in order to justify retrogressive measures or limitations on rights the government must demonstrate that (i) the measures are aimed at achieving a legitimate objective; (ii) the measures are rationally connected to the objective; and (iii) the measures are proportionate to that objective. In addition, limitations on rights must have a clear legal basis and satisfy the quality of law test.

3.33 The committee has emphasised that any restriction on fundamental rights which is stated to be necessary to achieve a legitimate purpose must be supported by empirical or other evidence to demonstrate the factual basis of the concerns that are sought to be addressed, a reasoned account of why they are important objectives, and a process for monitoring the correctness of the assumption that the measures will contribute to achieving those objectives. The justification for such limitations should be accompanied by an explanation of why a less restrictive alternative would not be available. The committee has also underlined that the government bears the onus of demonstrating that a restriction is justifiable.

### *Legitimate objective*

3.34 A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting rights:

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain ... protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[7]

3.35 The Minister's response explains that the main objective of the bill is to give effect to the government's policy position that complementary protection claims are more appropriately considered through administrative processes:

> The key objective of this Bill is to give effect to the Government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that Australia's non-refoulement obligations under the CAT and the ICCPR are more

7 *R v Oakes* [1986] 1 S.C.R. 103, 69.

> appropriately considered within an administrative mechanism for the purposes of the exercise of the Minister for Immigration and Border Protection's public interest powers.[8]

3.36 The Minister's response highlights two reasons for the government's policy position. The first relates to the government's view that the complementary protection framework can be exploited by people smugglers:

> This policy approach is being implemented as the Government considers that the current legislative framework for assessing complementary protection provides another product for people smugglers to sell. It is the Government's view that the current legislative complementary protection process creates a channel for asylum seekers to gain access to a permanent protection visa outcome, even where they are not found to be a refugee.[9]

3.37 The second reason is the government's long-standing opposition to complementary protection claims being considered as part of protection visa applications:

> The Coalition Government has always opposed the provision of complementary protection through the protection visa framework.[10]

3.38 The committee notes that, as at 31 January 2014, 75 protection visas (excluding dependants) had been granted on complementary protection grounds, since the commencement of the complementary protection provisions on 24 March 2012.[11] Of these 75 protection visa grants, 46 were granted to asylum seekers who arrived by boat.[12]

**3.39 Assessing the compatibility of this bill involves an assessment of whether the asserted factual basis for repealing the complementary protection legislation is supported by evidence. The committee accepts that discouraging irregular maritime travel is a legitimate objective. However, on the basis of the material before it, the committee is unable to conclude that that concerns about the exploitation of the complementary protection framework by people smugglers are borne out by the small number of protection visas which have been granted on**

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8 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 14.

9 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 14.

10 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 14.

11 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 13.

12 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 13.

**complementary protection grounds over the last two years, and of which only 46 relate to unauthorised maritime arrivals. Notably, this timeframe coincides with a period of unprecedented numbers of boat arrivals in Australia.**

**3.40 The committee notes that repealing the complementary protection legislation in order to achieve a policy position without further evidence that such a position is based on legitimate objectives is unlikely to meet the threshold requirement for objectives to be of sufficient importance to warrant restricting fundamental rights.**

*Other reasons*

3.41 The committee notes that in his second reading speech, the Minister provided additional reasons for the bill, including that:

- the current statutory framework for complementary protection is 'complicated, convoluted, difficult for decision-makers to apply, and is leading to inconsistent outcomes'; and
- 'the court's [sic] interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties'.

3.42 The committee sought further information from the Minister as to the bases for these views.

3.43 The Minister's response states that:

> The complementary protection legislation has only been in place since March 2012. In that time a number of interpretative issues have arisen both in how the department and the RRT interpret the complementary protection provisions. This has been further exacerbated by the way the courts have essentially broadened the scope of Australia's non-refoulement obligations beyond what the Government intended. …
>
> The Full Federal Court in SZQRB found that the decision-maker had been applying the wrong risk threshold test and that it should be a lower threshold. The original intention when the complementary protection provisions commenced was that the test to be applied was the 'more likely than not' threshold which is interpreted as more than a 50 percent chance of suffering significant harm. This is higher than the test that the Court has determined must be applied - the 'real chance' threshold test, which is the test used in the Refugees Convention context, and which can be satisfied where the chance of harm occurring is as low as 10 percent.[13]

13 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 10.

3.44 In *Minister for Immigration and Citizenship v SZQRB*,[14] the Full Court of the Federal Court of Australia held that the 'real risk' test for assessing whether a person was owed complementary protection was equivalent to the 'real chance' test which was used for assessing refugee protection claims.[15] The Court rejected the submission that 'real risk' was a higher threshold which required that the possibility of harm be 'more likely than not' (that is, on the balance of probabilities). The High Court of Australia has described a 'real chance' in the context of refugee assessments as a substantial chance, which is distinct from a remote or far-fetched possibility but it may be well below a 50 per cent chance.[16]

3.45 The committee notes the Minister's view that the approach taken by the Australian courts 'extend[s] well beyond what was intended by the human rights treaties'. However, it is not apparent to the committee that the current position under the ICCPR and the CAT is significantly different to the test adopted by the Australian courts. For example, in a recent decision by the UN Human Rights Committee (HRC), several members of that committee took the opportunity to clarify the HRC's current approach to the 'real risk' test, noting that the HRC's early formulations of the test which focused on whether violations of article 7 (or 6) of the ICCPR would take place upon removal was too strict (and could be contrasted with the broader approach that was adopted under the CAT):

> The degree of certainty suggested by [the HRC's] early Views contrasts with the standard set forth in Article 3 of the [CAT], which prohibits sending a person to 'another State where there are substantial grounds for believing that he would be *in danger of* being subjected to torture' (emphasis added). The focus on danger, or risk, has characterized the approach of both the Committee against Torture and the European Court of Human Rights to the question of return to torture.
>
> Article 7 [of the ICCPR] requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. … The phrasings have varied, and the Committee continues to refer on occasion to a 'necessary and foreseeable consequence' of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.
>
> In its submissions on the present Communication, the State party has … described the relevant issue as whether the necessary and foreseeable consequence of the deportation would be the killing or torture of the

14 [2013] FCAFC 33.

15 Per Lander and Gordon JJ at [240] – [246].

16 *Chan v MIEA* (1989) 169 CLR 379.

> authors. That is not the proper inquiry. The question should be whether the necessary and foreseeable consequence of the deportation would be a real risk of the killing or torture of the authors.[17]

3.46 The committee notes that the approach taken in comparable jurisdictions varies. For example, in the United Kingdom, complementary protection claims are assessed in accordance with the 'real chance' test,[18] similar to refugee assessments and is consistent with the approach adopted under the European Convention on Human Rights.[19] A similar approach is taken in New Zealand.[20] Other jurisdictions such as Canada apply a higher standard based on the balance of probabilities for assessing complementary protection claims.[21]

**3.47 Noting the seriousness of the threats faced by both categories of individuals, the Minister has not explained the basis for adopting a stricter test for assessing complementary protection claims than is applied to refugee protection assessments. The committee considers that it would be desirable to align both tests. In the committee's view the adoption of a stricter test than that which is applied by the Australian courts (which is consistent with the test applied by the HRC and the UN Committee against Torture under the ICCPR and the CAT) would appear to be incompatible with Australia's obligations under those conventions.**

3.48 Even if such an option is not taken up by the government, it is not clear why any unintended consequences could not be addressed through legislative refinement of the current framework by either simplifying and/or clarifying the correct test to be applied. The Minister's response states that:

> Whilst consideration was given to amending the complementary protection legislation, it has always been the policy position of this Government that it is not appropriate for complementary protection to be considered as part of the protection visa legislative framework. Therefore, this bill seeks to remove the complementary protection criteria from the [Migration Act].[22] …
>
> The policy shift by the Government to assess non-refoulement obligations on complementary protection grounds through the Minister exercising his or her intervention powers to grant the most appropriate visa ensures that

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17 UN Human Rights Committee, *Pillai v Canada*, (1763/08), 25th March 2011, pp 21-22 (Individual opinion by committee members Ms Helen Keller, Ms Iulia Antoanella Motoc, Mr Gerald L. Neuman, Mr.Michael O'Flaherty and Sir Nigel Rodley).

18 *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49.

19 *Chahal v United Kingdom* (1996) 23 EHRR 413.

20 *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012).

21 *Li v Canada (Minister of Citizenship and Immigration* [2005] FCJ No. 1934.

22 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 10.

> decisions are made dependent upon the individual circumstances of the case, not just Australia's non-refoulement obligations and a level of risk determined by the court. [23]

**3.49 The response does not explain what options were considered to amend the legislation or why they were considered unsuitable. The committee considers that repealing the legislative framework for complementary protection in order to revert to discretionary administrative processes is a serious step, not least because it diminishes full and transparent scrutiny before the Parliament and the courts of potentially rights-restricting measures and actions. The committee considers that it is incumbent on the government to explain any alternatives that were considered and the reasons for dismissing them in favour of repealing the legislation in its entirety. Simply stating that it is the government's policy position is not a sufficient response.**

### *Rational connection*

3.50 A measure will be rationally connected to its objective if it is likely to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if in fact the measure limiting the right will not make a real difference in achieving that aim.

3.51 The Minister's response states that:

> The repeal of the statutory complementary protection framework allows the Government to restore what it considers to be the most appropriate mechanism for considering complementary protection claims in a way that significantly reduces the risk of the framework being exploited. …
>
> This amendment will allow the Minister to exercise his or her intervention powers to grant the most appropriate visa dependent upon the individual circumstances of the case by taking into consideration not only Australia's non-refoulement obligations, but also Australia's broader humanitarian considerations and the unique circumstances of the individual case.[24]

3.52 A consequence of repealing the complementary protection framework is that everyone with complementary protection claims, regardless of whether their arrival in Australia was authorised or not, will be dealt with through administrative processes. The committee notes that this outcome would appear to go beyond one of the stated reasons of the repeal, namely to prevent the complementary protection framework from being exploited by people smugglers.

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23 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 11.

24 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 14-15.

3.53 In his second reading speech, the Minister stated that dealing with complementary protection claims through administrative processes would enable him to 'deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex, and who may be disadvantaged by a rigidly codified criterion'. The Minister's response, however, clarifies that the Minister already has the ability to deal with unique cases under the present system.[25] The committee notes that this outcome therefore is not dependent on the complementary protection legislation being repealed.

**3.54 The committee accepts that the bill will achieve the government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that Australia's non-refoulement obligations under the CAT and the ICCPR are more appropriately considered within administrative processes. However, as set out above, the committee is not satisfied that the Minister has provided relevant and sufficient reasons to meet the threshold requirements for demonstrating that these objectives are legitimate.**

### *Proportionality*

3.55 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups.

3.56 A proportionality assessment includes consideration of whether there are less restrictive means of achieving the aim, in other words, there should be no alternatives or less intrusive options available. The inclusion of adequate safeguards will also be an important factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse decision.

3.57 As the committee noted in its earlier comments on this bill, a vital safeguard that goes towards ensuring the right to an effective remedy in the context of giving effect to non-refoulement obligations is the availability of effective, independent and impartial review of removal decisions. Rigorous scrutiny of decisions involving non-refoulement obligations is required because of the irreversible nature of the harm that might occur. As the UN Committee against Torture has stated:

> The nature of refoulement is such … that an allegation of breach of [article 3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires … an opportunity for effective, independent and impartial review of the decision to expel or remove... The Committee's previous jurisprudence has

25 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 13.

> been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[26]

3.58 The UN Human Rights Committee has similarly emphasised that the requirement to provide effective remedies in domestic law is an integral component of satisfying non-refoulement obligations under the ICCPR.[27] In particular, there should be an opportunity for effective and independent review of a decision to remove and the absence of such review may amount to a breach of non-refoulement obligations.[28]

3.59 International and comparative human rights jurisprudence has identified various elements which are necessary to ensure the right to an effective remedy for non-refoulement decisions, including that:

- It must be effective in practice as well as in law;
- It must take the form of a guarantee, and not a mere statement of intent or a practical arrangement;
- It must have automatic suspensive effect;
- The appeals process must include adequate procedural safeguards, such as sufficient time to lodge an appeal and access to legal representation and interpreters; and
- Decisions must be subject to substantive review by an independent and impartial body.

3.60 The leading commentary on the ICCPR states that 'decisions made solely by *political* and subordinate administrative *organs* (especially governments) do not constitute an effective remedy within the meaning of [article 2(3)(b) of the ICCPR]; it follows that States parties are obligated to place priority on judicial remedies.'[29]

3.61 The committee appreciates the further information provided in the Minister's response regarding the administrative processes that are proposed to be implemented to deal with complementary protection claims. The response acknowledges that merits review will not be available for any non-refoulement

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26 *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, UN Doc. CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14).

27 See, for example, Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para. 12.

28 *Alzery v. Sweden*, 10 November 2006, No.1416/2005, para 11.8.

29 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005), p 64. (footnotes omitted, emphasis in original).

decisions taken under these arrangements, but maintains that the combination of administrative processes and the availability of judicial review under the High Court's original jurisdiction will provide sufficient oversight:

> While the Minister cannot be compelled to exercise the public interest intervention powers, the actions of the Minister under the new administrative process will be subject to judicial review as the Minister is an Officer of the Commonwealth for the purposes of section 75(v) of the Constitution. Similarly, non-refoulement assessments by departmental officers are also subject to judicial review.
>
> Further, as a result of the Federal Court decision in SZQRB, the removal power (and thus any potential for action leading to refoulement) under the Migration Act is not available until any claims for protection (including complementary protection) have been assessed according to law and in a procedurally fair manner.
>
> The Government considers that the proposed administrative process combined with opportunities for judicial review will provide effective oversight mechanisms.[30]

3.62 The Minister's response maintains that 'the bill does not alter the content of Australia's obligations, but rather the process by which these obligations are assessed'.[31]

**3.63 The committee notes that provision of 'independent, effective and impartial' review of non-refoulement decisions is an integral part of and a threshold requirement for complying with the non-refoulement obligations under the ICCPR and the CAT. While there is no obligation under these treaties to provide a particular type of visa for persons to whom Australia owes non-refoulement obligations, human rights law does require provision for an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. The absence of such provision means that the government's stated commitment not to remove anyone contrary to Australia's non-refoulement obligations cannot be guaranteed.**

**3.64 The committee retains its concerns that any availability of judicial review under the High Court's original jurisdiction is likely to be of limited value for challenging decisions made pursuant to the Minister's discretionary and non-compellable intervention powers under the Migration Act. Judicial review generally focuses on the process by which the decision is made, and is not concerned about the merits of the decision. The subject matter of the review is whether the decision**

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30 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 16.

31 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 16.

**was made in accordance with the law. In contrast, merits review considers all the evidence about the merits of a decision and decides whether or not a correct and preferable decision should be made.**

**3.65 The committee does not consider that the combination of administrative arrangements as proposed and judicial review are sufficient to satisfy the standards of 'independent, effective and impartial' review, required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT. The committee notes that the government has also not demonstrated why a less restrictive alternative that retains some form of right to independent merits review should not be available.**

**3.66 In light of the information before it, the committee is not able to conclude that the bill is compatible with the right to an effective remedy under article 2(3) of the ICCPR in conjunction with articles 6 and 7 of the ICCPR, and article 3 of the CAT. The committee notes that the amendments therefore risk being inconsistent with Australia's non-refoulement obligations under these treaties. The committee considers that the retention of some form of independent merits review of non-refoulement decisions is a minimum requirement to ensure the bill's compatibility with human rights.**

***Family and children's rights***

**3.67 The committee welcomes the Minister's assurances that 'members of the same family unit of a person in respect of whom Australia has non-refoulement obligations who would previously been eligible for a protection visa under the complementary protection framework will continue to be provided similar protections under any Ministerial intervention process'.[32] The committee, however, retains its concerns about the discretionary nature of the arrangements.**

***Prohibition against arbitrary detention***

**3.68 The committee notes that the proposed administrative processes appear to go some way towards addressing the inefficiencies of the previous administrative arrangements and may therefore reduce the risk of persons being detained for extended periods of time while their claims are processed.[33]**

32 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 18.

33 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 18-19.

***Right to a fair hearing***

**3.69 In light of the information provided in the Minister's response,[34] the committee makes no further comment on those aspects of the bill which relate to the right to a fair hearing.**

34 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 19-20.

***Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013***

The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the Bill's objectives, including how they are considered to be pressing and substantial. In particular, the committee requests the following information and would appreciate the provision of relevant and sufficient evidence in support of the answers:

- The basis for considering that the current system is 'complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes' and why any such difficulties could not be addressed through legislative refinement of the scheme.

The Complementary protection legislation has only been in place since March 2012. In that time a number of interpretative issues have arisen both in how the department and the RRT interpret the complementary protection provisions. This has been further exacerbated by the way the courts have essentially broadened the scope of Australia's non-refoulement obligations beyond what the Government intended.

Whilst consideration was given to amending the complementary protection legislation, it has always been the policy position of this Government that it is not appropriate for complementary protection to be considered as part of the Protection visa legislative framework. Therefore, this Bill seeks to remove the complementary protection criteria from the Migration Act 1958 (the Act).

- The basis for considering that the courts have expanded the scope of the legislation, how this has adversely affected the implementation of the legislation, and why any unintended consequences could not be addressed through legislative refinement of the scheme.

Following the commencement of the complementary protection legislation, a number of court decisions have changed the interpretation of Australia's complementary protection obligations to a more generous interpretation that was originally understood.

The Full Federal Court in SZQRB found that the decision-maker had been applying the wrong risk threshold test and that it should be a lower threshold. The original intention when the complementary protection provisions commenced was that the test to be applied was the 'more likely than not' threshold which is interpreted as more than a 50 percent chance of suffering significant harm. This is higher than the test that the Court has determined must be applied – the 'real chance' threshold test, which is the test used in the Refugees Convention context, and which can be satisfied where the chance of harm occurring is as low as 10 percent.

The policy shift by the Government to assess non-refoulement obligations on complementary protection grounds through the Minister exercising his or her intervention powers to grant the most appropriate visa ensures that decisions are made dependent upon the individual circumstances of the case, not just Australia's non-refoulement obligations and a level of risk determined by the court.

- How the argument that the scope of the legislation has been expanded by the courts is consistent with the statement that only a small number of protection visas on complementary protection grounds have been granted.

Whilst the Government acknowledges that to date only a small number of Protection visas have been granted on complementary protection grounds, the full impact of recent court decisions such as the Full Federal Court's judgment in SZQRB have not yet become evident.

The number of visa grants is also a separate operational issue to the Government's policy that it is not appropriate for complementary protection to be considered as part of the protection visa legislative framework.

- The basis for considering that the process is inefficient because of the small number of protection visas that have been granted, when it would appear that comparably small numbers of humanitarian visas were granted under the previous administrative arrangements.

- The basis for considering that administrative arrangements would be more efficient when it appears that they were previously removed for being inefficient, including the overall timeframes for resolving complementary protection claims under the current system compared to the previous arrangements.

The Government acknowledges that the previous administrative arrangements in place, prior to the enactment of the complementary protection legislation, had some inefficiencies. A new administrative process is being developed to meet this Government's policy position and to ensure greater efficiency compared with the previous administrative process.

The previous administrative process was not undertaken within any specific timeframes nor was a person afforded procedural fairness as part of that assessment. The Government is not proposing to return to exactly the same administrative process following the passage of this Bill.

The new administrative process being developed will ensure that assessment of non refoulement claims and personal facts will be undertaken in a more efficient, comprehensive,

timely and procedurally fair manner in accordance with relevant law and in a procedurally fair manner.

Under the proposed new administrative process, a person will be referred for a departmental non-refoulement assessment in one of 3 circumstances:

1. during the course of assessing a detained applicant's protection visa application on refugee convention grounds, a primary decision maker identifies complementary protection issues that require further investigation;

2. the RRT refers a case to the department upon identifying complementary protection issues during the course of their review that require further investigation; or

3. where a person is raising complementary protection claims, or the department identifies complementary protection issues, during the course of removal proceedings and that person has not previously been through the Protection visa process.

This referral mechanism will ensure that rather than having to assess every case against the complementary protection criteria, regardless of whether a person's case has either identified or given rise to such issues, consideration will be limited to the significant yet small cohort that have been identified for immediate referral.

Under the new administrative process, clear timeframes for completing non-refoulement assessments will be put in place. These timeframes will differ dependent upon whether a person is in detention or lawfully in the community. Decision makers will prioritise detention cases in order to ensure such cases are finalised within a shorter timeframe.

It is the department's intention that in order to maintain efficiency and timeliness the same decision maker who undertook the person's primary refugee assessment will undertake the non-refoulement assessment. Where a person is found to engage Australia's non-refoulement obligations under the CAT or the ICCPR, the department will prioritise the case's referral to the Minister for his or her consideration.

Whether applicants who meet the complementary protection criterion have to satisfy additional criteria, such as character and security checks, before being granted a protection visa.

Regardless of whether complementary protection issues are considered as part of the current statutory framework or within an administrative process, character and security issues will be assessed.

However, under the proposed administrative process, where the Minister personally considers the use of his or her intervention powers under the Act, the Minister may exercise his ministerial discretion to grant a visa to a person irrespective of whether they meet the character and security requirements for the grant of a visa. This can occur if the Minister

considers, given the unique circumstances of the individual case, it is in the public interest to do so. In this circumstance, the Minister is also able to fully consider a variety of visa or other case resolution options.

The number of protection visas that have been granted on complementary protection grounds to applicants who arrived by boat.

As at 31 January 2014, 75 Protection visas (excluding dependants) have been granted on complementary protection grounds, since the commencement of the complementary protection provisions on 24 March 2012. Of these 75 Protection visa grants, 46 were granted to IMAs.

Whether the Minister is able to exercise his intervention powers to grant relief in unique cases under the present system.

Under the current system, the Minister is able to consider the exercise of his or her intervention powers under sections 48B, 195A and 417 of the Act. Generally, access to the exercise of these powers is available only to persons who have not established their right to a visa.

Following an RRT decision, a person may request the Minister to intervene in their case to make a more favourable decision using his or her power under section 417 of the Act. In these circumstances a person may believe they meet one or more of the unique or exceptional circumstances set out in the Minister's Guidelines.

At any stage after a person has received a primary Protection visa decision refusal they may request the Minister to intervene under section 48B of the Act to lift the application bar and allow them to lodge a further Protection visa application where they have new claims, or there has been a significant change in circumstances, that would enhance the chance of them being successfully granted a Protection visa on either Refugees Convention or Complementary Protection grounds.

The Minister is also able to grant a visa using section 195A to a person who is in immigration detention if the Minister considers it in the public interest to do so.

In many cases, a person requesting the Minister to consider exercising his personal powers has already applied for a Protection visa, sought merits review and judicial review.

The committee intends to write to the Minister for Immigration and Border Protection to request that when providing the information on the objectives of the Bill it would be appreciated if an assessment is included as to whether and how the objectives identified are likely to be furthered through this bill.

- The inclusion of adequate safeguards will be a key factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse decision.

*Objectives of the Bill*

The key objective of this Bill is to give effect to the Government's policy position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that Australia's non-refoulement obligations under the CAT and the ICCPR are more appropriately considered within an administrative mechanism for the purposes of the exercise of the Minister for Immigration and Border Protection's public interest powers.

This policy approach is being implemented as the Government considers that the current legislative framework for assessing complementary protection provides another product for people smugglers to sell. It is the Government's view that the current legislative complementary protection process creates a channel for asylum seekers to gain access to a permanent protection visa outcome, even where they are not found to be a refugee.

The Coalition Government has always opposed the provision of complementary protection through the protection visa framework.

*How these objectives will be furthered through this Bill*

The repeal of the statutory complementary protection framework allows the Government to restore what it considers to be the most appropriate mechanism for considering complementary protection claims in a way that significantly reduces the risk of the framework being exploited.

Australia's non-refoulement obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012. Where the Minister for Immigration and Border Protection is satisfied that the person engages Australia's non-refoulement obligations under the CAT and the ICCPR, it is then available to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

This amendment will allow the Minister to exercise his or her intervention powers to grant the most appropriate visa dependent upon the individual circumstances of the case by taking into consideration not only Australia's non-refoulement obligations, but also Australia's broader humanitarian considerations and the unique circumstances of the individual case.

*Safeguards*

The Bill does not propose to resile from or limit Australia's non-refoulement obligations in any way, nor is it intended to withdraw from any Conventions to which Australia is a party.

Australia remains committed to adhering to our non-refoulement obligations under the CAT and the ICCPR. Anyone who is found to engage Australia's non-refoulement obligations under these treaties will not be removed from Australia in breach of these obligations.

The Bill does not alter the content of Australia's obligations, but rather the process by which these obligations are assessed.

It is intended that the new administrative process assessing a person's complementary protection claims will be undertaken by qualified and experienced protection officers. These departmental officers will be guided by clear policy and procedural guidance when conducting non-refoulement assessments.

Under the new administrative process, the experienced protection officers will still be undertaking a non-refoulement assessment but doing so either immediately following the primary protection visa decision or RRT decision for detained applicants. Access to Ministerial intervention and pre-removal assessment processes will be maintained. There will, however be no consideration of complementary protection claims during merits review. Access to judicial review remains unaffected.

The justification for expunging the statutory review rights in their entirety and a reasoned explanation of why a less restrictive alternative that retained some form of express, statutory right of review would not be available.

Whether the envisaged administrative arrangements will include provisions for independent, effective and impartial review of non-refoulement decisions; and if not, how it is considered that the amendments are consistent with the right to an effective remedy for non-refoulement decisions.

Whether the administrative arrangements and their implementation will include adequate oversight mechanisms.

The Bill does not limit the ability of applicants to seek merits review or judicial review in relation to a protection visa application based on Refugee Convention Grounds.

It is proposed that, under the new administrative process, as was the case prior to the enactment of complementary protection legislation, if the relevant review tribunal examining claims based on Refugees Convention grounds identify complementary protection issues during the course of its review of the case, the review tribunal will refer cases to the department for consideration of complementary protection claims for the purposes of the exercise of the Minister's intervention powers.

While the Minister cannot be compelled to exercise the public interest intervention powers, the actions of the Minister under the new administrative process will be subject to judicial review as the Minister is an Officer of the Commonwealth for the purposes of section 75(v) of the Constitution. Similarly, non-refoulement assessments by departmental officers are also subject to judicial review.

Further, as a result of the Federal Court decision in SZQRB, the removal power (and thus any potential for action leading to refoulment) under the Migration Act is not available until any claims for protection (including complementary protection) have been assessed according to law and in a procedurally fair manner.

The Government considers that the proposed administrative process combined with opportunities for judicial review will provide effective oversight mechanisms.

Noting that Australia's non-refoulement obligations are absolute and in light of the grave consequences for individuals that could result from removal of a person from Australia in violation of those obligations, the committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the government's intention to rely on purely discretionary administrative processes to uphold these obligations is adequate to satisfy the quality of law test.

The committee notes that various shortcomings have been expressed with regard to the discretionary nature of the administrative arrangements that preceded the current statutory scheme, including that:

- decisions could only be made by the Minister personally;
- no-one could compel the Minister to exercise the powers;
- there was no specific requirement to provide natural justice;
- there was no requirement to provide reasons if the Minister does not exercise the power; and there was no merits review of decisions by the Minister

The Government acknowledges that the previous administrative arrangements that were in place prior to the enactment of the complementary protection legislation in March 2012 had a number of shortcomings when considering non-refoulement obligations under the CAT and the ICCPR. However, should the Bill be passed the Government is not proposing to return to these same administrative arrangements. Rather, the new administrative process is being

developed to ensure that any complementary protection issues that are identified in the conduct of interviews or others will be immediately elevated

The proposed administrative process will include:

- A referral mechanism for primary protection visa decision-makers and the RRT to immediately refer cases (for clients in detention) which identify complementary protection issues during the course of the protection visa assessment on Refugees Convention grounds;
- A referral mechanism where substantive complementary protection issues have been identified at the removal stage regardless of whether a person has previously been through a Protection visa process
- Assessments of complementary protection claims by the same qualified and experienced departmental decision makers who undertake primary protection visa assessments;
- Procedural fairness requirements which afford the opportunity for a person to raise specific complementary protection claims, and to comment on any country information that is relevant, significant and adverse to the non-refoulement assessment finding;
- Timeframes for departmental officers to complete non-refoulement assessments which vary dependent upon whether a person is in immigration detention or lawfully in the community;
- Clear, detailed policy and procedural guidance for decision makers when making assessments;

Where a person is found to engage Australia's non-refoulement obligations under the CAT or the ICCPR the department will notify them of this outcome and that their case is being referred to the Minister for Immigration and Border Protection for consideration of the exercise of his non-compellable public interest powers. Despite the fact that the Minister's public interest powers are both personal and non-compellable, it is not the Government's intention to resile from its non-refoulement obligations in any way but rather determine the most appropriate visa outcome which suitably reflects the unique and wide ranging situations that arise in cases which have been found to engage these non-refoulement obligations.

The committee intends to write to the Minister for Immigration and Border Protection to seek further information as to:

- whether removing the express guarantee for members of the family unit of a person who is owed non-refoulement obligations to remain in Australia is consistent with the right to equality and non-discrimination in article 2(1) of the ICCPR and article 26 of the ICCPR; and

- the manner in which the envisaged administrative arrangements will take into account family unity and the best interests of children, the prioritisation given to these matters and the likely timeframes involved.

The Government remains committed to adhering to our international obligations and this Bill does not seek to alter this commitment in any way. The proposed new administrative process is not intended to discriminate between members of a family unit of a person who engages Australia's non-refoulement obligations under CAT and ICCPR and people who engage those obligations personally.

Article 26 of the ICCPR is a standalone right which will be breached if a person does not enjoy equality before the law or equal protection of the law with others, on the basis of discrimination on a prohibited ground (such as 'other status'). It prohibits arbitrary enforcement of laws and requires that objectively equal fact patterns be treated equally and objectively unequal fact patterns be treated differently. The Government accepts that article 26 is however subject to the principle of legitimate differential treatment.

Members of the same family unit of a person in respect of whom Australia has non-refoulement obligations who would previously been eligible for a Protection visa under the complementary protection framework will continue to be provided similar protections under any Ministerial intervention process. Where a person is found to engage Australia's non-refoulement obligations and referred for Ministerial intervention, as part of this process the department will take into account considerations such as to family unity and the best interests of the child. These considerations will play a key role in determining the type of recommendations put forward to the Minister concerning the most appropriate visa options to resolve a case.

Where children are involved in a case being considered for complementary protection under the new administrative process, these cases will be accorded increased priority.

The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the envisaged administrative arrangements that are intended to replace the current statutory scheme are compatible with the prohibition against arbitrary detention.

Under the new administrative process, a person in immigration detention will be immediately referred for a non-refoulement assessment where:

a) during the course of assessing an applicant's protection visa application on refugee convention grounds, a primary decision maker identifies complementary protection issues that require further investigation;

b) the RRT refers a case to the department upon identifying complementary protection issues during the course of their review that require further investigation; or

c) where a person is raising complementary protection claims, or the department identifies complementary protection issues, during the course of removal proceedings and that person has not previously been through the Protection visa process.

The proposed administrative process will escalate the cases of persons in immigration detention to the Minister's attention so prolonged detention will not occur as a result of introducing the administrative process.

The Committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the application of these amendments to decisions are either currently under review or which have been reviewed and remitted back to the department for finalisation is compatible with the right to a fair hearing.

This Bill expresses a clear legislative intention for the amendments to apply to those non-citizens who made an application prior to this Act commencing. This overrides any rights that may have already been accrued by an applicant to have their application considered in accordance with the law that existed at the time they applied. However, it is not the Government's intention to disregard any issues raised in relation to the consideration of complementary protection criteria during the merits review or judicial review stages following the commencement of the amendments.

It is also the Government's intention to ensure that where the RRT was undertaking a review of a protection visa application at the time of commencement of these amendments, and the review raised concerns in relation to the primary decision's consideration of the complementary protection criteria, whilst the RRT's decision would have to be made without consideration of the complementary protection criteria, the RRT will be able to refer the case back to the department to revisit the non-refoulement assessment under the new administrative process.

There may also be some applicants who have sought judicial review of a decision not to grant a Protection visa, where that decision was made prior to the commencement of these amendments. In this case, this decision would have been "finally determined" which means that it would be outside the scope of these amendments. However, if the court determines that there has been jurisdictional error and the matter is remitted so that it can be considered according to law, the legal position is that there has never been a valid decision to refuse the

visa application, which means that the application has never been "finally determined". In these circumstances, the new law would apply to these applicants and any fresh assessment of the Protection visa application would have to be made without consideration of the complementary protection criteria. However, where a case is remitted back to the RRT following a jurisdictional error in relation to a complementary protection issue, it is intended that the RRT will be able to refer that case to the department for consideration of complementary protection should such claims be identified.

# Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013

*FRLI: F2013L01218*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 12 November 2013*
*PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013*
*Response dated: 20 January 2014*

# Migration Amendment (Disclosure of Information) Regulation 2013

*FRLI: F2013L02101*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

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

*FRLI: F2013L02102*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

# Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155

*FRLI: F2013L02105*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

**Background**

3.70 These four instruments introduced modifications to the Bridging E (Class WE) visa (BVE) scheme, principally in the context of its application to asylum seekers who are unauthorised maritime arrivals.

3.71 A BVE is a temporary visa that is ordinarily granted to 'unlawful non-citizens' to enable them to lawfully live in the community while their immigration status is finalised or while they make arrangements to leave Australia. Since November 2011,

over 20,000 asylum seekers who arrived by boat have been released from immigration detention on BVEs pending determination of their protection claims.

3.72 The BVE cohort may also include unauthorised maritime and air arrivals who have been found to engage Australia's protection obligations. This is because of recent amendments introduced by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013, which means that all unauthorised arrivals are ineligible for grant of a permanent protection visa and such persons may continue to remain on BVEs, even after being found to be refugees or to otherwise engage Australia's protection obligations.

3.73 These four instruments made the following changes to the BVE scheme:

- The **Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013** introduced enhanced powers to cancel a BVE under a broad range of circumstances, including if a person has been charged or convicted of any offence in Australia or elsewhere, irrespective of the seriousness of the offence and whether the person poses a threat to public safety.
- The **Migration Amendment (Disclosure of Information) Regulation 2013** introduced enhanced information-sharing powers to enable the disclosure of personal information about BVE holders to the Australian Federal Police (AFP) or the police force of any Australian state or territory for the purposes of supporting existing powers to cancel a BVE.
- The **Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013** and the **Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155** introduced a mandatory code of behaviour as an additional visa condition for certain BVE holders. A person who breaches the code may be returned to immigration detention, transferred to Nauru or Manus Island, or have their income support reduced or terminated.

## Information sought by the committee

3.74 The committee considered these instruments in its First and Second Reports of the 44th Parliament and sought further information from the Minister for Immigration and Border Protection on a range of matters, which are discussed in the committee's comments below.

3.75 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extracts from the Minister's response are attached.

## Committee's response

3.76 The committee has considered the Minister's response in relation to each of these four instruments together, given their interrelated nature.

## *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013*

3.77 The committee thanks the Minister for his response.[1]

*Consequences of cancellation*

3.78 A person who has their BVE cancelled will be re-detained and become liable for removal from Australia or transfer to a regional processing country. The committee sought information whether cancelling a BVE under these provisions would in any circumstance be in and of itself grounds for the removal of the person as an unlawful non-citizen or for transferring the person offshore. The Minister's response explains that:

> The cancellation and re-detention of a BVE holder may lead to the person being removed from Australia to their home country or transferred offshore where the department is satisfied that no non-refoulement obligations exist in respect of the individual. The decisions to cancel or refuse a person's visa in itself will not create grounds for removal.[2]

**3.79 The committee thanks the Minister for this clarification and notes that it would have been helpful for this information to have been included in the statement of compatibility.**

3.80 The committee also sought clarification about the circumstances when a court could suspend the removal of a person, including whether such powers extended to a decision to transfer a person to a regional processing country. The Minister's response states that:

> The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. Courts can issue injunctions in order to preserve the status quo pending the final resolution of litigation or as final relief, following the determination of the substantive issues before the court.[3]

3.81 The committee thanks the Minister for his response but notes that the response does not provide the information sought by the committee.

**3.82 The committee intends to write to the Minister for Immigration and Border Protection to again seek clarification on the circumstances in which a court may issue an injunction to prevent a person's removal or their transfer to a regional**

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1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 4-7.

2 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 4.

3 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

**processing country. In particular, the committee seeks an explanation as to how and when a person may seek an injunction before the courts, and the grounds on which the courts may grant an injunction.**

*Scope of cancellation powers*

3.83 The committee had expressed concern that the amendments would enable a BVE to be cancelled under an extremely broad range of circumstances. Of particular concern to the committee was the low threshold which was set for triggering the exercise of these powers. Notably, a BVE could be cancelled on the basis that a person has been charged with or convicted of *any* offence, whether committed in Australia or elsewhere, irrespective of its seriousness and whether the person poses a threat to public safety. The committee recommended that the cancellation powers should be amended to provide a requirement for the relevant decision-maker to be satisfied that (i) the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and (ii) the exercise of the power is no more restrictive than is required in the circumstances.

3.84 In his response, the Minister declined to accept the committee's recommendation, stating that:

> Legislation alone cannot guarantee compliance with Australia's human rights obligations. Compliance with Australia's international obligations is broader than the content of the Act - it also extends to what Australia does *in toto* by way of legislation, administration and practice.[4]

3.85 In essence, the Minister's response argues that any legislative amendments are unnecessary because (i) 'although the legislation provides a trigger for considering cancellation of the [BVE], the decision to cancel … remains discretionary';[5] (ii) 'under policy, the decision-maker may take account of a range of factors when exercising the discretion to cancel;[6] and (iii) the BVE holder 'will be invited to show the grounds for cancellation do not exist or there is a reason why the visa should not be cancelled'.[7]

**3.86 The committee notes that these arguments have been raised as a matter of routine in relation to many of the legislative proposals considered by the committee that arise from the migration portfolio. The committee has emphasised**

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4 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

5 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

6 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

7 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

**on multiple occasions, including in relation to migration amendments, that limitations on rights must not only be reasonable, necessary and proportionate to a legitimate objective, but that they must be prescribed by law, that is, they must have a clear legal basis, including being publicly accessible and not open-ended. The committee notes again that interferences with fundamental rights which are based solely on administrative discretion are likely to be impermissible under human rights law.**

**3.87 The committee reiterates that its mandate to assess the compatibility of legislation with Australia's human rights obligations necessarily encompasses a requirement to evaluate whether the legislation is sufficiently confined to ensure that human rights *will* be adequately respected in practice, and not simply whether the legislation *could* be applied consistently with human rights. The committee remains of the view that the amendments as drafted are not suitably circumscribed to provide sufficient protection against a person being arbitrarily detained, contrary to article 9 of the International Covenant on Civil and Political Rights.**

**3.88 The committee also intends to write to the Minister for Immigration and Border Protection to request clarification with regard to the following statement in his response: 'As a general rule, a visa should not be cancelled where the breach of [of a visa] condition occurred in circumstances beyond the visa holder's control'.[8] This would appear to give the decision-maker the discretion to cancel the BVE irrespective of how the breach occurred. The committee considers that it should be a requirement for the decision-maker not to cancel a BVE where the person is not at fault for the breach.**

*Exclusion of merits review*

3.89 The committee had expressed concern at the absence of merits review for BVE cancellation decisions which are subject to a conclusive certificate by the Minister. The Minister may issue a conclusive certificate under section 399 of the *Migration Act 1958* if he believes it would be contrary to the 'national interest' to change a decision or for the decision to be reviewed. The committee sought information from the Minister whether the exclusion of merits review in these circumstances was consistent with the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and the prohibition against arbitrary detention in article 9 of the ICCPR. The committee noted that BVE cancellation decisions would be subject to judicial review but that such review would only be compatible with article 9 of the ICCPR if it if it included the power to release a person from detention if the detention cannot be objectively justified.

3.90 In his response, the Minister notes that the courts have accepted that the term 'national interest' is 'a broad expression and that the question of what is or is

8 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

not in the national interest is an evaluative one entrusted to me as Minister for Immigration and Border Protection'.[9] The response nevertheless maintains that the availability of judicial review for BVE cancellation decisions is adequate:

> Issuing a conclusive certificate would not prevent the person concerned from challenging a visa cancellation decision through judicial review. The decision to cancel a visa may be reviewed on a number of grounds at law, including a lack of natural justice, whether the wrong legal test was applied or whether the decision maker acted in an illogical or unreasonable manner. The availability of judicial review, even where merits review is not available, satisfies the requirements of article 14 to the extent that article may apply to proceedings relating to visa decisions. A decision to issue conclusive certificates is also subject to judicial review.[10]

3.91 In relation to the committee's concern that the courts can only review detention on the basis of lawfulness, rather than on the basis of whether or not the detention is arbitrary, the response simply states that:

> This has always been the case and does not result from any new limitation on the courts introduced by these amendments.[11]

**3.92 The committee accepts that, generally, the availability of judicial review for visa cancellation decisions would be sufficient to satisfy the requirements of the right to a fair hearing in article 14(1) of the ICCPR.**

**3.93 In circumstances where a cancellation decision results in the re-detention of the person, however, the relevant issue is whether the availability of judicial review only is consistent with the prohibition against arbitrary detention in article 9 of the ICCPR. The Minister's response acknowledges that judicial review in these circumstances would not be able to test whether the decision to re-detain the person is objectively justified. The committee notes that the ability of an independent judicial review body to assess whether the detention is substantively arbitrary, not merely whether it is in accordance with law is a minimum requirement for compliance with the prohibition against arbitrary detention in article 9 of the ICCPR. The Minister's argument that 'this has always been the case' vis-à-vis the limited reach of judicial review in the Australian context is not an adequate response. Noting (i) the broad range of circumstances in which a BVE may be cancelled; (ii) the low threshold for triggering the exercise of the cancellation powers; and (iii) the broad meaning which is given to the term**

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9 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

10 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

11 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 6-7.

**'national interest' for the purposes of issuing conclusive certificates, the committee is not satisfied that the Minister has provided relevant and sufficient reasons to demonstrate that the exclusion of merits review for BVE cancellation decisions that are subject to a conclusive certificate is consistent with article 9 of the ICCPR.**

## *Migration Amendment (Disclosure of Information) Regulation 2013*

3.94 The committee thanks the Minister for his response.[12]

### *Memoranda of Understanding*

3.95 The committee had noted that that many of the key safeguards and procedures for implementing these new disclosure powers are to be contained in the relevant Memoranda of Understanding currently being negotiated with the Federal, State and Territory police.

**3.96 The committee remains of the view that it is difficult to assess whether the powers are compatible with human rights in the absence of further information about the specific content of these memoranda. The committee is therefore grateful to the Minister for undertaking to keep the committee apprised of progress towards finalising the Memoranda of Understanding. The Minister's response, however, did not confirm whether the final documents would be provided to the committee, as requested. The committee intends to write to the Minister to seek confirmation that copies of the final agreements will be provided to the committee for its information and assessment.**

**3.97 The committee thanks the Minister for confirming that the Privacy Commissioner was satisfied that the amendments as drafted are consistent with his recommendations and that his recommendations with regard to the drafting of the Memoranda of Understanding are being considered.**

### *'Necessary and appropriate'*

3.98 The committee notes the Minister's explanation that the standard of 'necessary and appropriate' for the exercise of the disclosure powers is consistent with the requirements of the *Privacy Act 1988* and his view that 'adhering to Australia's international obligations is broader than the content of the [Migration] Act – it also extends to what Australia does *in toto* by way of legislation, administration and practice'.[13] The response considers that the disclosure powers are consistent with the right to privacy in article 17 of the ICCPR because:[14]

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12 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 23-27.

13 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 25.

14 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 25.

- 'the amendments, by requiring [the Minister] to consider whether disclosure is necessary or appropriate, are proportionate in their limitation on the right to privacy';
- the amendments are 'limited in relation to who is subject to the provisions and in relation to the type of information which can be disclosed'; and
- 'restrictions on the storage, use and further disclosure of information provided to police will be included in memoranda of understanding'.

**3.99 The committee notes the Minister's explanations but remains concerned that the standard of 'appropriate' would not appear to be fully consistent with the requirement under international human rights law that restrictions on rights be 'necessary'.**

**3.100 The committee notes that no information authorised by these amendments has been disclosed to the relevant police forces to date. Given that many of the key safeguards are to be contained in the Memoranda of Understanding, the committee intends to write to the Minister to seek clarification whether the disclosure powers authorised by these amendments are intended to be used prior to the relevant memoranda being finalised.**

*Right to non-discrimination*

3.101 The committee considered that the amendments may give rise to issues of compatibility with the right to equality and non-discrimination as the disclosure powers pertain to information about BVE holders only and not to other visas classes. It was not clear, for example, whether the government considered that the BVE cohort carries a higher public safety threat than other visa cohorts.

3.102 In his response, the Minister basically reiterates the claim in the statement of compatibility that there is a heightened expectation that the Minister and department act in a timely manner in relation to any risks posed by a BVE holder because 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.

**3.103 As the committee has previously noted, the committee does not consider the argument that a BVE is 'a privilege and not an entitlement' is a satisfactory justification for the differential treatment between BVE holders and other visa holders. Releasing individuals whose continued detention cannot be objectively justified is a necessary requirement for compliance with Australia's obligations under article 9 of the ICCPR, relating to the prohibition against arbitrary detention.**

**3.104 The committee, however, accepts the Minister's explanation that the amendments are necessary to overcome inconsistent arrangements across the different jurisdictions and are intended to implement a uniform national process. In this regard, the committee notes that the department currently only becomes**

**aware of information about BVE holders who have been charged or convicted of an offence on an *ad hoc* basis. The committee considers that, subject to the provision of appropriate safeguards for the use, disclosure and storage of the information disclosed, the amendments do not appear to be inconsistent with the right to equality and non-discrimination.**

## *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155*

3.105 The committee noted that the introduction of a mandatory code of behaviour for BVE holders risked authorising serious breaches of human rights and sought further information to ascertain whether the amendments were aimed at achieving a legitimate objective, and were reasonable, necessary and proportionate to that objective.

3.106 The committee thanks the Minister for his response.[15]

### *Statement of compatibility*

3.107 The committee noted that the instrument specifying the wording of the code itself is not subject to disallowance but that it would be good practice for all legislative instruments, particularly where they limit human rights, to be accompanied by a statement of compatibility, irrespective of whether such a statement is technically required under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

3.108 The Minister's response 'notes that committee's suggestion',[16] and states that:

> The government will continue to abide by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which outlines when statements of compatibility are required to be prepared under the Act in relation to certain legislative instruments.[17]

**3.109 The committee observes that the Minister is taking a literal approach to the statement of compatibility requirement. The committee notes that the statement of compatibility requirement was introduced by the *Human Rights (Parliamentary Scrutiny) Act 2011* (HR(PS) Act) to, among other things, assist the committee and the Parliament generally to understand the government's rationale for considering whether any limitations of human rights in legislation are justifiable. Statements of compatibility are also an important indication of whether human rights have been**

15 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 28-35.

16 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 29.

17 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 29.

**adequately taken into account in the legislative process. If the government maintains that its reforms in the migration portfolio are consistent with its human rights obligations and has articulated its intention to fulfil those obligations, the committee considers that, as a matter of best practice consistent with the spirit of the HR(PS) Act, the government should provide its justifications for considering that the proposed legislation is compatible with human rights, regardless of whether a statement of compatibility is strictly required. This is particularly the case where legislation may involve limitations on rights.**

*Legitimate objective*

3.110 The committee asked whether the amendments were aimed at a public safety objective or if their primary purpose was to ensure that BVE holders comply with 'community expectations'.

3.111 The Minister's response states that:

> In order to effectively protect the Australian community and to maintain integrity and public confidence, the Government has introduced measures that provide the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour, encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. I am of the view that it is reasonable to hold a non-citizen to a higher standard of behaviour, where I have temporarily released them from detention on a BVE that I have granted in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Migration Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.[18]

3.112 The response states that prior to the introduction of the behaviour code on 14 December 2013, there was limited ability to cancel a BVE for behaviour that did not amount to a criminal charge or conviction:

> Under the previously existing Australian migration regulations there was scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence. However, this did not adequately capture repeated anti-social activities that did not attract a charge or conviction, but which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example, intimidation and threats against service provider staff members; or allegations of domestic violence where the victim does not wish the matter to be dealt with through criminal justice processes. … The code now addresses such

18 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 29-30.

> broader issues and focusses on public safety issues, such as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration.[19]

3.113 The response states that the behaviour code is also aimed at securing public health objectives:

> The code also seeks to ensure that health issues of BVE holders are appropriately managed and do not present a risk to the community. The code achieves this by requiring BVE holders who have signed it not to refuse to comply with any health undertaking provided by the department or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes. Health undertakings which require continued health treatment and/or to undertake further health assessments in the community are usually issued only for serious conditions such as tuberculosis.[20]

3.114 The committee asked for the basis on which the conclusion had been reached that BVE holders presented a particular risk to public safety and whether any identified risk exists on a scale that would justify the adoption of a behavioural code for all BVE holders.

3.115 The Minister's response states that an average of two irregular maritime arrivals (IMAs) had been charged with criminal offences every week in the approximately three month period between the election in September 2013 and the introduction of the behaviour code in December 2013, including in relation to murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving.[21] The committee notes that this roughly translates to around 24 people (or approximately 0.1%) out of more than 20,000 IMAs on BVEs currently in the community.

3.116 The Minister's response also states that as at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained but does not explain the basis for these cancellations.[22] The response further states that 24 IMAs whose BVE had ceased have been re-detained following involvement in a criminal matter.[23] The response does not explain if these include the individuals who had been charged

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19 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

20 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

21 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

22 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

23 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

with a criminal offence between September and December 2013, mentioned above. The response goes on to say that the number of BVE holders whose charges or convictions have resulted in visa cancellation under the new prescribed cancellation ground at regulation 2.43(1)(p) since 1 July 2013 (that is, in accordance with Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013, discussed above) is 56; of these two cancellations have been set aside by the Migration Review Tribunal (thus deemed never to have been cancelled).[24] It is not clear whether these numbers include the 50 IMAs who have had their BVEs cancelled as at 31 January 2014.

3.117 The committee notes that the statistics provided in the Minister's response do not give a clear account of the scope of the problem the government suggests BVE holders represent and which would necessitate the introduction of a mandatory code of behaviour for all BVE holders. The numbers provided appear to largely relate to situations where the BVE was cancelled as a consequence of the person engaging in criminal conduct. The committee notes that the powers to deal with such conduct already exist in migration legislation. The committee also notes that the number of BVE holders who engaged in criminal conduct in the three month period identified in the Minister's response would appear to comprise 24 people out of a BVE population of over 20,000 people. By comparison, the general rate of criminal offending in NSW in 2012 was over 2000 criminal incidents per 100,000 population, which is equivalent to 500 incidents per 100,000 population every three months or 100 per 20,000 population.[25] It would therefore appear that the rate of criminal offending in the wider community is substantially greater than the rate for BVE holders.

3.118 The committee also notes that the response appears to rely on anecdotal evidence to support the need for introducing enhanced cancellation powers to capture behaviour that falls short of criminal conduct. The response cites emerging issues relating to intimidation and threats against service provider staff members and allegations of domestic violence, but does not provide any evidence to support this assertion, including information as to the frequency of such incidents.

**3.119 The committee considers that the protection of public safety is a legitimate objective. The committee also accepts that conduct that does not attract a criminal charge or conviction may nevertheless still constitute a public safety issue. Similarly, the committee considers that measures which are aimed at public health objectives to be legitimate.**

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24 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

25 See Table A2, *Rate of criminal incidents recorded by NSW Police per 100 000 population by year and offence type*, available at: https://www.police.nsw.gov.au/about_us/crime_statistics/number_of_criminal_incidents_recorded_by_the_nsw_police_force_per_100,000_population_by_year_and_offence_type

**3.120 The committee, however, notes that the government must show that there are objective and reasonable grounds for adopting a specific behaviour regime applicable only to BVE holders and that any asserted factual basis for the differential treatment is supported by evidence.**

**3.121 While the committee accepts that the measures are primarily aimed at public safety objectives, the committee remains concerned that the necessity for these measures has not been adequately demonstrated.**

*Rational connection*

3.122 The Minister's response does not specifically address the question of whether and how the specific directives in the behaviour code (which range from expectations relating to compliance with the laws of Australia; to values that are important to Australian society; and co-operation with the Immigration Department in regard to the resolution of a BVE holder's status) are rationally connected to a legitimate objective.

**3.123 The committee, nevertheless, accepts that the code may provide the opportunity for early warning and preventative measures to be taken where necessary to protect public safety, provided that these are applied in a proportionate manner.**

*Proportionate response*

3.124 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects on individuals. The committee notes that the consequences of breaching the code are potentially severe. A person who breaches the code may be returned to immigration detention, including becoming liable to be transferred to a regional processing country, or have their income support reduced or terminated.

3.125 The inclusion of adequate safeguards will be a key factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse impact.

3.126 The committee appreciates the additional explanations provided by the Minister but notes that the justifications put forward still rely primarily on (i) policy guidance, and (ii) the option not to exercise the powers as the basis for concluding that the measures are compatible with human rights.

3.127 The committee's key concerns as to the proportionality of these measures relate to the following aspects:

- The breadth of the cancellation powers, combined with the low threshold for exercising the powers;

- The option to reduce or terminate a person's income support as a method for sanctioning breaches of the code; and
- The absence of adequate oversight and monitoring mechanisms.

***Visa cancellation powers***

3.128 The behaviour code is an enforceable tool which provides a basis for cancelling a BVE. The statement of compatibility for these amendments acknowledged that the code captures 'a wide range of criminal offences or general conduct'. The committee is concerned that the general and open-ended nature of the directives, which cover a very wide range of behaviour, means the threshold for exercising these powers is set at a very low level. Any breach of the code could result in the BVE being cancelled, irrespective of its seriousness or whether the person poses a threat to public safety.

3.129 The Minister's response states that:

> Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remain discretionary, allowing the decision-maker to take account the merits of the case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given the particulars of those grounds and the information because of which the grounds appear to exist. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.[26]

3.130 The response argues that even though the cancellation process could be triggered by any breach of the code, there remain other options to deal with a breach:

> [W]hile the cancellation ground may be enlivened [by a breach of the code], there are a number of other sanctions that can be applied where a breach of the code has occurred, which can be tailored to suit individual circumstances and allow for flexible application. These sanctions include the use of counselling and warning letters for less serious breaches of the code, which are aimed at educating BVE holders further on the terms of the code and reinforcing behavioural expectations.[27]

3.131 The committee has already noted its concerns with regard to the broad powers for cancelling a BVE under the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.[28] The committee reiterates its view that

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26 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 34.

27 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 34.

28 See comments above.

legislation must be sufficiently confined to ensure that human rights will be adequately protected in practice. As noted above, interferences with fundamental rights which are based solely on administrative discretion are likely to be impermissible under human rights law.

3.132 For these measures to be proportionate, the committee considers that the power to cancel a BVE holder's visa for breach of the code should only be possible when the decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
- that the exercise of the power is no more restrictive than is required in the circumstances.

**3.133 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.**

*Exclusion of merits review*

3.134 The committee notes that merits review of a decision to cancel a BVE for a breach of the code will not be available if the Minister issues a conclusive certificate, pursuant to section 399 of the Migration Act, stating that it would be contrary to the national interest to change a decision or for the decision to be reviewed. The committee has already noted its concerns about the exclusion of merits review for BVE cancellation decisions subject to a conclusive certificate in its comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.[29]

3.135 The Minister's response says that 'historically, this power has been exercised rarely'. The response does not explain whether and how the exercise of this power would be appropriate in the context of decisions to cancel a BVE for a breach of the code.

**3.136 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the types of situations envisaged and possible examples where it would be appropriate to issue a conclusive certificate for visa cancellation decisions relating to a breach of the code of behaviour.**

***Reduction or termination of income support***

3.137 A BVE holder receiving income support payments under the Asylum Seeker Assistance Scheme (ASAS) or the Community Assistance Support (CAS) programmes may have their income support reduced or terminated as a consequence of breaching the code.

3.138 The Minister's response states that:

29 See comments above.

> It is expected that temporary reduction or cessation of income support payments will be applied rarely. The decision to reduce or cease income support payments will be considered on a case by case basis, such as, where the IMA is not engaging in resolving their immigration status despite repeated contact from the department. Any reduction or cessation of income support payments will also take into consideration factors such as the family composition and the impact of the decision on the family as well as any flow on effects on the broader community and NGO sector. It is also expected that a BVE holder will be given opportunities to respond to alleged breaches of the code before any decision is made to temporarily reduce or cease payments.[30]

3.139 The committee notes that:

- Payment for income support under the CAS and ASAS is 89% of the equivalent Centrelink Special Benefit (which is comparable to 89% of Newstart Allowance).[31]
- Decisions to reduce or terminate income support payments are not subject to merits review.[32]
- BVE holders who arrived by boat after 13 August 2012 (that is, the majority of BVE holders) do not have permission to work.[33]

3.140 Our predecessor committee had noted that the absence of work rights combined with the provision of minimal support for asylum seekers on BVEs risks resulting in their destitution, contrary to the right to work and an adequate standard of living in article 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.[34]

3.141 In light of the already minimal support that is provided to BVE holders, the committee is concerned that any further reduction to their income support payments is likely to have a disproportionately severe impact on the person and their family. The committee is hard pressed to see how terminating a BVE holder's income

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30 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

31 For example, a single adult receives an income support payment of$445.89 per fortnight, as opposed to a family of four with two children aged 4 and 16 which would receive an income support payment of $l,288.05 per fortnight. See: Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

32 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

33 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

34 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013*, 19 June 2013, p 83.

support in these circumstances could ever be a reasonable option given that the person is also barred from working.

3.142 For these measures to be proportionate, the committee considers that:

- the power to sanction a BVE holder for breach of the code by reducing or terminating their income support must only be possible if the decision-maker is satisfied that such action will not result in the destitution of the person or their family; and
- decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.

**3.143 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.**

***Oversight and monitoring***

3.144 The committee considers that the implementation of the behaviour code has the potential to stigmatise BVE holders in the community. The provision of clear oversight and monitoring mechanisms is therefore critical.

3.145 The Minister's response states that:

> The department is alert to the need to mitigate against the potential abuse of the code by people with malicious intent such as disgruntled neighbours or estranged family members. As previously noted, any BVE holder whose visa is cancelled as a result of a breach of the code will be afforded procedural fairness similar to any cancellation process. The department has a strong relationship with service providers who are working with IMA BVE holder in the community. The department is advised of any adverse treatment of BVE holders as part of its regular communication with service providers. There is no evidence to suggest that the code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by the department and I would consider any appropriate action at that time.[35]

3.146 The committee accepts that the Immigration Department has strong relationships with service providers dealing with BVE holders in the community and this provides an important channel for relevant information to be passed to the department.

**3.147 The committee, however, notes that these processes appear to be *ad hoc* rather than a systematic approach to monitoring the impacts of the behaviour code on individuals in the community. The committee considers that there should be**

35 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 33.

**express monitoring mechanisms in place to assess the impact of these measures on BVE holders, including regular opportunities to consult with the affected individuals and other interested parties.**

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

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letter of 10 December 2013 in which further information was requested on the following legislative instruments:

- *Migration Act 1958 – Determination under subsection 262(2) – Daily Maintenance Amounts for Persons in Detention – October 2013* [F2013L01785];
- *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* [F2013L01218];
- *Migration Amendment (Temporary Protection Visas) Regulation 2013* [F2013L01811];
- *Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]; and
- *Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185].

My responses in respect of the above-named legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
20 / 1 /2014

As with immigration detention, the grant of a Bridging E (Subclass 050 and Subclass 051) Visa (BVE) is one option to manage the resolution of the immigration status of unlawful non-citizens and to provide for the appropriate protection of the community while that resolution of status is progressed. The BVE is a core tool used by departmental compliance officers to manage persons in the community who would otherwise be subject to immigration detention. The BVE is used for a broad range of persons and is not limited to asylum seekers.

Many BVE holders have become unlawful since arriving lawfully in Australia, and may include those unlawful non-citizens who have had:

- a visa cancelled after arrival or were not immigration cleared on arrival;
- a visa which ceased to be in effect; or
- a visa application refused and have become an unlawful non-citizen following that refusal.

Since November 2011, BVEs have also been granted to Illegal Maritime Arrivals (IMAs) in immigration detention. As IMAs are barred by the Act from making a valid application for a visa, if I wish to grant a BVE to an IMA I must use my personal, non-delegable powers under section 195A of the Act to grant a visa to a person in immigration detention where I think it is in the public interest to do so.

Where information becomes available to indicate that the BVE holder presents a risk to the Australian community, I (or a departmental decision-maker where I have delegated my power to them) may assess whether or not the discretionary cancellation powers under paragraphs 2.34(1)(p) or (q) should be used. These regulations detail a range of objective measures for determining whether a person may present a risk that may warrant visa cancellation and return to immigration detention. However, there is capacity for decision makers to take into account other considerations in deciding whether to exercise discretion to cancel a person's visa.

*Refoulement* concerns and Court power to suspend removal of a person, including transfer of a person to a regional processing country

I note that the Committee seeks clarification in relation to:

- whether the fact of cancelling of a BVE under these provisions, would in any circumstance be in and of itself a ground for removal of the person as an unlawful non-citizen or for transferring the person offshore; and
- the circumstances where a court can suspend the removal of a person, including whether such powers extend to a decision to transfer a person to a regional processing country.

The Australian Government takes its *non-refoulement* obligations seriously, and does not remove asylum seekers who have been found to engage Australia's protection obligations or who are still waiting for an assessment of their protection claims. There is no intention to change this practice or to breach the obligation of *non-refoulement* as articulated in the 1951 Refugees Convention and article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and as implied in articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR).

The cancellation and re-detention of a BVE holder may lead to the person being removed from Australia to their home country or transferred offshore where the department is satisfied that no *non-refoulement* obligations exist in respect of the individual. The decision to cancel or refuse a person's visa in itself will not create grounds for removal.

The Act establishes a framework of rules to regulate the entry and presence of non-citizens in

Australia. It also establishes obligations concerning the non-citizens' removal when their presence is no longer permitted in Australia by law. The removal power in section 198 of the Act imposes a duty on an officer of the department to remove an unlawful non-citizen as soon as reasonably practicable. This means that a person becomes liable for removal as soon as they become unlawful (that is, they no longer hold a valid visa to remain in Australia). The actual removal, however, will not take place until the person has had an opportunity to exhaust all available application and merits review entitlements.

All IMAs who arrive in Australia on or after 13 August 2012 are liable for transfer to a Regional Processing Country (RPC) for assessment of their protection claims. Similarly to section 198 of the Act, the obligation to transfer a person to an RPC under section 198AD of the Act only exists in relation to those IMAs who do not hold a valid visa. A person whose BVE has been cancelled will become liable for detention and transfer by operation of law rather than as a result of the cancellation. A decision to transfer a person will be subject to separate considerations (such as the person's individual circumstances, logistical issues and availability of space in the RPC).

Regional processing countries have provided the Commonwealth of Australia with assurances under Memoranda of Understanding that they will:

- not expel or return a Transferee to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership or a particular group or political opinion;
- make an assessment, or permit an assessment to be made, of whether or not a Transferee is covered by the definition of refugee in Article 1A of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees; and
- not send a Transferee to another country where there is a real risk that the Transferee will be subjected to torture, cruel, inhumane or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.

The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. Courts can issue injunctions in order to preserve the status quo pending the final resolution of litigation or as final relief, following the determination of the substantive issues before the court.

The tests for the grant of an injunction are well established in common law.

Redrafting of the amendments, access to merits review and arbitrary detention

I note that the Committee has recommended that the amendments are redrafted to provide a requirement that a BVE cancellation decision is predicated on a threat to public safety that is sufficiently serious. Legislation alone cannot guarantee compliance with Australia's human rights obligations. Compliance with Australia's international obligations is broader than the content of the Act – it also extends to what Australia does *in toto* by way of legislation, administration and practice.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that I notify a visa holder if there appear to be grounds for cancellation and give particulars of those grounds and the information because of which the grounds appear to exist. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled. Furthermore, under policy, the decision maker may consider a range of matters when exercising the discretion to cancel.

These include:

- The purpose of the visa holder's travel to and stay in Australia;
- If cancellation is being considered because of a breach of visa condition, the reason for, and extent of, the breach. As a general rule, a visa should not be cancelled where the breach of condition occurred in circumstances beyond the visa holder's control;
- The degree of hardship that may be caused to the visa holder and any family members;
- The circumstances in which the ground for cancellation arose (for example, whether extenuating or compassionate circumstances outweigh the grounds for cancelling the visa);
- The visa holder's past and present behaviour towards the department (that is, the officer takes into account any previous non-compliance, for instance, whether they have been truthful in statements or applications made to the department or have previously complied with visa conditions); and
- Whether Australia has obligations under relevant international legal instruments that would be breached as a result of the visa cancellation, such as:
    - If there are children in Australia whose interests could be affected by the cancellation;
    - Whether the cancellation would lead to removal in breach of Australia's *non-refoulement* obligations;
    - Other obligations arising from international legal instruments;
    - The impact of cancellation on any victims of family violence, where family violence is a factor; and
    - Any other relevant matters.

Before cancelling a visa under section 116 of the Act, the decision maker must, as a matter of law under section 119, notify the non-citizen of an intention to consider cancelling the visa. The visa holder will be invited to show the grounds for cancellation do not exist or there is a reason why the visa should not be cancelled. Under the Act, the visa holder must be given all relevant information before the discretion to cancel can be exercised.

I note further that the Committee seeks further information on whether the absence of a merits review for cancellation decisions which are subject to a conclusive certificate is compatible with the right to a fair hearing in article 14(1) of the ICCPR and the entitlement to bring proceedings before a court under article 9 of the ICCPR.

*The Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* does not include any provisions which restrict access to merits review of cancellation decisions. My power to issue conclusive certificates is contained in existing section 339 of the Act and is available in relation to decisions that would otherwise be 'MRT [Migration Review Tribunal]-reviewable' decisions under the Act.

Pursuant to section 339, I can issue a conclusive certificate if I believe it would be contrary to the national interest to change a decision or for the decision to be reviewed. The effect of issuing a conclusive certificate is that the decision is not reviewable by the MRT. The phrase 'national interest' is not defined for the purposes of section 339, but the courts have accepted that it is a broad expression and that the question of what is or is not in the national interest is an evaluative one entrusted to me as Minister for Immigration and Border Protection.

Issuing a conclusive certificate would not prevent the person concerned from challenging a visa cancellation decision through judicial review. The decision to cancel a visa may be reviewed on a number of grounds at law, including a lack of natural justice, whether the wrong legal test was applied or whether the decision maker acted in an illogical or unreasonable manner. The availability of judicial review, even where merits review is not available, satisfies the requirements of article 14 to the extent that article may apply to proceedings relating to visa decisions. A decision to issue conclusive certificates is also subject to judicial review. The Committee has expressed concern that the Courts can only review detention on the basis of lawfulness, rather than on the basis of whether or not the detention is arbitrary. This has always been the case and does not result from any new

limitation on the courts introduced by these amendments.

In light of the above, the Australian Government considers that *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* is not incompatible with the right to a fair hearing in article 14(1) of the ICCPR and entitlement to take proceedings before a court pursuant to article 9 of the ICCPR.

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

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letters of 11 February 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Amendment Bill 2013*;
- *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*;
- *Customs Amendment (Record Keeping Requirements and Other measures) Regulation 2013* [F2013L01968];
- *Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156* [F2013L02038];
- *Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101];
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* [F2013L02102];
- *Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155* [F2013L02105]; and
- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* [F2013L02104].

My responses in respect of the above-named bills and legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
25/3/2014

***Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101]**

The grant of a Bridging E (Subclass 050 and Subclass 051) Visa (BVE) is one option to manage the resolution of the immigration status of unlawful non-citizens. The BVE is a core tool used by departmental Compliance officers to manage persons in the community who would otherwise be subject to immigration detention. The BVE is used for a broad range of persons and is not only granted to asylum seekers.

Many BVE holders have become unlawful since arriving lawfully in Australia, and may include those unlawful non-citizens who:

- have had a visa cancelled after arrival or were not immigration cleared on arrival;
- have had a visa which ceased to be in effect; or
- whose visa application was refused and they became an unlawful non-citizen following that refusal.

Since November 2011, BVEs have also been granted to Illegal Maritime Arrivals (IMAs) in immigration detention. As IMAs are barred by the *Migration Act 1958* (the Act) from making a valid application for a visa, if I wish to grant a BVE to an IMA, I use my personal, non-delegable powers under section 195A of the Act to grant a visa to a person in immigration detention where I think it is in the public interest to do so.

Reasons for amendments

Where information becomes available to indicate that the BVE holder presents a risk to the Australian community, I (or a departmental delegate) may assess whether or not the discretionary cancellation powers under paragraphs 2.43(1)(p) or (q) should be used. These regulations detail a range of objective measures for determining whether a person may present a risk that may warrant visa cancellation and return to immigration detention. However, there is capacity for decision makers to take into account other considerations in deciding whether to exercise the discretion to cancel a person's visa.

Before I, or a delegate, can consider cancellation of a BVE under paragraphs 2.43(1)(p) or (q), I must have access to information about when the holder has been charged with or convicted of an offence. The *Migration Amendment (Disclosure of Information) Regulation 2013* (the amendments) support a framework of information sharing with Federal, State and Territory police which would assist police to provide timely advice when a BVE holder has been charged with or convicted of an offence.

Consultation with Privacy Commissioner

The Committee has sought clarification about whether the Privacy Commissioner was satisfied that the amendments as drafted are consistent with his recommendations. The Committee has also requested that I keep them apprised of progress in relation to the finalisation of the relevant memoranda of understanding and that the Committee is provided with the final documents for its information and assessment.

In his response to the department dated 3 February 2014, the Privacy Commissioner stated that he was pleased to note that his comments on the amendment to the Migration Regulations relating to Bridging E Visa holders had been incorporated into that instrument. The Privacy Commissioner also acknowledged that his comments regarding the drafting of memoranda of understanding were being considered.

The department is continuing to engage with State and Territory police regarding the drafting of memoranda of understanding for information disclosure. The department will continue to keep the Parliamentary Joint Committee apprised of progress towards finalisation of the memoranda of understanding between the department and state/territory police.

Right to Privacy

The Committee has sought clarification about the basis upon which information about whether a visa holder had been charged with or convicted of an offence had previously been shared with the department and why this approach was considered deficient, necessitating the introduction of measures which permit the sharing of all BVE holders' information.

Formal and consistent arrangements across all eight police jurisdictions nationwide covering the disclosure of information do not presently exist. This has resulted in potential risks to the community due to the department being uninformed of criminal activity and as a result not reassessing a person's placement in the community. The engagement being undertaken by the department with state and territory police is intended to overcome these inconsistent processes with a standard national process that is underpinned by memoranda of understanding that clearly specify limitations on information disclosure, storage and disposal.

The Committee sought clarification about the number of BVE holders who have been charged or convicted of an offence. The department does not have this information, as currently it only becomes aware of information about BVE holders who have been charged or convicted of an offence on an *ad hoc* basis. The department can advise, however, that the number of BVE holders whose charges or convictions have resulted in visa cancellation under the new prescribed cancellation ground at regulation 2.43(1)(p) since 1 July 2013 (when this ground became available) is 56. Two of these cancellations have been set aside by the Migration Review Tribunal (thus deemed never to have been cancelled).

The Committee has sought information about the types of safeguards that have been provided or will be provided via the memoranda of understanding for using, storing and disclosing the information, including whether the police authorities may disclose the information to the public or other authorities and the duration of time that the information may be retained.

The draft memoranda of understanding will have a number of clauses that will limit or prevent usage, storage or further disclosure of information provided to state or territory police. The department is undertaking consultation to ensure that memoranda of understanding terms are consistent with the *Privacy Act 1988* and State and Territory Privacy Legislation. The department has consulted the Privacy Commissioner in regards to the drafting of the memoranda of understanding and final copies of the agreements will be provided to the Privacy Commissioner for information.

The Committee has also queried how the standard of 'appropriateness' contained in paragraph 5.34F(3) is consistent with the human rights requirement of demonstrating that a limitation on a right must be 'necessary'.

Paragraph 5.34F(3) states that I, as Minister for Immigration and Border Protection, may authorise the disclosure of information only if I reasonably believe:

> *'the disclosure is necessary or appropriate for the performance of functions or the exercise of powers under the Act.'*

The phrase *'necessary or appropriate'* is consistent with the language adopted in section 504(1) of the Act, which states:

> *'the Governor-General may make regulations, not inconsistent with this 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 this Act* (emphasis added)*'*.

Adhering to Australia's international obligations is broader than the content of the Act – it also extends to what Australia does *in toto* by way of legislation, administration and practice.

The amendments, by requiring me to consider whether disclosure is necessary or appropriate, are proportionate in their limitation on the right to privacy. The amendments are also limited in relation to who is subject to the provisions (BVE holders) and in relation to the type of information which can be disclosed. As discussed above, restrictions on the storage, use and further disclosure of information provided to police will be included in memoranda of understanding.

The amendments are not in conflict with the Privacy Act as currently drafted. They are also consistent with changes to the Privacy Act made by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*, which come into effect on 12 March 2014. From that date the Department of Immigration and Border Protection will become an 'enforcement body' under the Privacy Act (the Australian Federal Police and police forces or services of a State or a

Territory are currently enforcement bodies). Under new Australian Privacy Principle 6.2(e) it will be permissible for an APP entity (defined to be an agency or organisation) to use and disclose personal information if the entity *'reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body'.*

Under the amended Privacy Act it will therefore be open to the department to disclose personal information about BVE holders to police, provided the department reasonably believes the disclosure is reasonably necessary, either for its own enforcement-related activities, or for the enforcement-related activities of the relevant police force or service.

The disclosure of information amendments, supported by the proposed memoranda of understanding with police, provide a framework for disclosure of information about BVE holders. This framework is being developed in consultation with the Privacy Commissioner and, as discussed above, will include a number of safeguards in relation to the storage, use and further disclosure of the information disclosed.

To date no information authorised by this regulation change has been disclosed by the department to the Australian Federal Police, or to State and Territory police forces or services.

Right to non-discrimination

The Committee has sought clarification about whether the amendments are consistent with the right to equality and non-discrimination.

The amendments will facilitate the release of information about BVE holders to police for the purpose of ensuring that the department is informed when BVE holders are charged with or convicted of an offence. The limitation on the right to privacy resulting from the amendments is therefore aimed at achieving a purpose which is legitimate. Before information can be disclosed pursuant to regulation 5.34F, I must decide that the disclosure is necessary and appropriate. Furthermore, the type of information to be disclosed is limited under paragraph 5.34F(3). The limitation on the right to privacy is, therefore, based on reasonable and objective criteria. The restrictions on disclosure under regulation 5.34F, and the further restrictions which will be included in the memoranda of understanding with police, ensure that the limitation on the right to privacy arising out of the amendment is proportionate to the aim to be achieved.

The Committee also queried why a limitation on privacy should be applied to BVE holders, which is not applied to holders of other visas. As discussed in the statement of compatibility with human rights, immigration detainees may be released on a BVE if they do not pose a risk to the Australian community. There is an expectation that BVE holders do not engage in criminal conduct of any kind while they reside in the community. In cases where it becomes obvious that the BVE holder does become a risk to the community, there is an expectation

that I and my department act in a timely manner. This expectation is especially heightened when the person has been granted a BVE by me using my personal powers. 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.

BVE holders should be subject to stricter scrutiny than other visa holders because of the nature of the cohort (persons who, if not for the visa grant, would be subject to immigration detention). BVE holders are, moreover, also subject to possible visa cancellation if charged with or convicted of an offence. In order to properly exercise my powers under the Act it is necessary that I receive information about BVE holders charged with or convicted of an offence. The amendments are part of an information sharing framework with Federal, state and territory police that would enable police to provide this information to the department. The information sharing arrangements will be further defined and limited by memoranda of understanding with police. My department is liaising with the Privacy Commissioner in relation to the formulation of these memoranda.

For the reasons discussed above, the amendments are consistent with the right to equality and non-discrimination.

***Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013*** **[F2013L02102]**

***Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155*** **[F2013L02105]**

The Bridging E visa (BVE) is a core tool used by departmental Compliance officers to manage persons in the community who would otherwise be subject to immigration detention. The BVE is used for a broad range of persons and is not limited to asylum seekers.

Many BVE holders have become unlawful since arriving lawfully in Australia, and may include those unlawful non-citizens who have had:

- a visa cancelled after arrival or were not immigration cleared on arrival;
- a visa which ceased to be in effect; or
- a visa application refused and become an unlawful non-citizen following that refusal.

Since November 2011, BVEs have also been granted to more than 20,000 Illegal Maritime Arrivals (IMAs) in immigration detention, significantly increasing the numbers of BVE holders in the community and resulting in IMAs comprising the majority of BVE holders in Australia.

IMAs are barred by the Migration Act 1958 (the Act) from making a valid application for a visa. If I wish to grant a BVE to a non-citizen in detention, including an IMA, I use my personal, non-delegable powers under section 195A of the Act to grant a visa to a person in immigration detention where I think it is in the public interest to do so.

The grant of a visa in these circumstances is not a right, and there is no right for such BVEs to be renewed when they expire. They are conferred on these non-citizens in the expectation that they will abide by the law, will respect the values that are important in Australian society, participate in resolving their status, and will not cause or threaten harm to individuals or groups in the Australian community. These considerations contribute to my judgement as to whether it is in the public interest to use my powers to allow these people to hold a BVE.

I consider it reasonable that non-citizens being released into the community on a BVE, particularly where the non-citizen has not lived in the Australian community previously, are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

Signing the code will ensure that non-citizens granted a BVE are aware of the behaviours that are expected of them while living in the community. The introduction of a mandatory behaviour code also provides the opportunity for early warning and preventative measures to be taken before more serious behavioural problems arise. In addition, the code provides a mechanism to ensure the protection of the Australian community through visa cancellation

and re-detention of a person who engages in certain types of behaviour generally not considered to be acceptable in the Australian community.

There are a range of other grounds under which a BVE holder could be considered for visa cancellation. For example, where a BVE holder is charged with, or convicted of a criminal offence, I (or a departmental delegate) may assess whether or not the discretionary cancellation powers under paragraphs 2.43(1)(p) should be used.

Good practice for all legislative instruments to be accompanied by a statement of compatibility

The government is aware that The Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 is exempt from the requirement to provide a statement of compatibility as it is not defined as a disallowable legislative instrument within the meaning of section 42 of the Legislative Instruments Act 2003. The government will continue to abide by section 9 of the Human Rights (Parliamentary Scrutiny) Act 2011, which outlines when statements of compatibility are required to be prepared under the Act in relation to certain legislative instruments. The government notes the Committee's suggestion at paragraph 2.62.

The objective of the code

I note that the Committee seeks clarification in relation to (2.72 & 2.76):

- whether the amendments seek to achieve a public safety objective or if their primary purpose is to ensure that BVE holders comply with 'community expectations';
- If the amendments are pursuing a public safety objective, the basis on which the conclusion has been reached that BVE holders present a particular risk to public safety and whether any identified risk exists on a scale that would justify the adoption of a behavioural code for all BVE holders;
- The basis on which I concluded that the current BVE regime, which includes newly enhanced powers to cancel a BVE is deficient, so as to necessitate these further bases for cancellation; and
- Whether and how the specific directives contained in the code of behaviour are rationally connected to achieving public safety.

In order to effectively protect the Australian community and to maintain integrity and public confidence, the Government has introduced measures that provide the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour, encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. I am of the view that it is

reasonable to hold a non-citizen to a higher standard of behaviour, where I have temporarily released them from detention on a BVE that I have granted in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Migration Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.

When I announced the implementation of the behaviour code on Friday 20 December 2013, I noted that an average of two IMAs had been charged with criminal offences every week since the election. Charges laid against IMAs at that time included murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving. As at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained, and 24 whose BVE had ceased have been re-detained following involvement in a criminal matter. The number of BVE holders whose charges or convictions have resulted in visa cancellation under the new prescribed cancellation ground at regulation 2.43(1)(p) since 1 July 2013 is 56. Two of these cancellations have been set aside by the Migration Review Tribunal (thus deemed never to have been cancelled).

Under the previously existing Australian migration regulations there was scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence. However, this did not adequately capture repeated anti-social activities that did not attract a charge or conviction, but which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example:

- Intimidation and threats against service provider staff members;
- Allegations of domestic violence where the victim does not wish the matter to be dealt with through criminal justice processes.

The code now addresses such broader issues and focusses on public safety issues, such as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration. The code also seeks to ensure that health issues of BVE holders are appropriately managed and do not present a risk to the community. The code achieves this by requiring BVE holders who have signed it not to refuse to comply with any health undertaking provided by the department or direction issued by the Chief Medical Officer (immigration) to undertake treatment for a health condition for public health purposes. Health undertakings which require continued health treatment and/or to undertake further health assessments in the community are usually issued only for serious conditions such as tuberculosis.

The department receives a range of information from a number of sources about people living in the Australian community on visas, including BVE holders. Whether this information relates to a breach of the code will be assessed on a case by case basis. Any BVE holder whose visa is cancelled as a result of a breach of the code of behaviour will be afforded procedural fairness similar to any cancellation process.

The introduction of a mandatory behaviour code is also intended to provide the opportunity for early warning and preventative measures to be taken in relation to less than criminal matters, before more serious behavioural problems arise.

Enforcement and Operation of the code

I note that the Committee seeks clarification on the following issues (2.88):

- Whether BVE cancellation decisions for breach of the code may be subject to a conclusive certificate by the Minister, resulting in the exclusion of merits review of such decisions;
- Whether a person's income support may be reduced or terminated ('ceased') as a consequence of a breach of the code and whether such decisions are subject to independent review;
- The specific amount of income support currently provided to BVE holders and whether BVE holders have work rights, in order to assess the reasonableness of the option to reduce or stop a person's income support;
- Whether consideration has been given to allowing the person to apply for a further BVE where new information comes to light (for example, if the original cancellation was based on unfounded grounds), rather than simply relying on the Minister's discretion to grant a further visa;
- The agencies which will be tasked with enforcing the code, including how it is intended that evidence will be gathered with regard to any allegation of a breach of the code;
- Whether the recently enhanced information-sharing powers between the Immigration Department and the federal, state and territory police with regard to BVE holders are intended to be utilised for the purposes of policing the code;
- Whether the treatment of BVE holders in the community will be monitored and steps taken to address any adverse impacts arising from the implementation of these measures.

My power to issue conclusive certificates is contained in section 339 of the Act and is available in relation to decisions that would otherwise be *'MRT* [Migration Review Tribunal]-*reviewable'* decisions under the Act. Historically, this power has been exercised rarely. Pursuant to section 339, I can issue a conclusive certificate in relation to a decision to cancel a BVE for breach of the code of behaviour if I believe it would be contrary to the national interest to change a decision or for the decision to be reviewed. The effect of issuing a conclusive certificate is that the decision is not reviewable by the MRT; however, judicial review of the decision would continue to be available. The phrase *'national interest'* is not defined for the purposes of section 339, but the courts have accepted that it is a broad

expression and that the question of what is or is not in the national interest is an evaluative one entrusted to me as Minister for Immigration and Border Protection. The regulation changes of 2013 have not changed these powers to issue a conclusive certificate for any decision reviewable by the MRT.

An IMA BVE holder receiving income support payments under the Asylum Seeker Assistance Scheme (ASAS) or the Community Assistance Support (CAS) programmes may have their income support reduced or ceased as a consequence of breaching the code. Assistance and support under these two policy programmes are not legislative entitlements or designed to provide welfare support to non-citizens. Rather this support is provided as a tool to overcome any barriers to the resolution of their immigration status.

It is expected that temporary reduction or cessation of income support payments will be applied rarely. The decision to reduce or cease income support payments will be considered on a case by case basis, such as, where the IMA is not engaging in resolving their immigration status despite repeated contact from the department. Any reduction or cessation of income support payments will also take into consideration factors such as the family composition and the impact of the decision on the family as well as any flow on effects on the broader community and NGO sector. It is also expected that a BVE holder will be given opportunities to respond to alleged breaches of the code before any decision is made to temporarily reduce or cease payments. The reduction or cessation of income support payments are not subject to merits review.

Payments for income support under the CAS and ASAS is 89 per cent of the equivalent Centrelink Special Benefit. For example, a single adult receives an income support payment of $445.89 per fortnight, as opposed to a family of four with two children aged 4 and 16 which would receive an income support payment of $1 288.05 per fortnight. While many BVE holders have permission to work, IMA BVE holders who arrived by boat after 13 August 2012 do not have permission to work.

I refer to the Committee's question in relation to whether consideration has been given to allowing a person to apply for a further BVE in certain circumstances. Under the Migration Amendment (Bridging Visas-Code of Behaviour) Regulation 2013, any person who has had a BVE cancelled for reason of failure to comply with condition 8564 or 8566, or where the visa was cancelled under a ground specified in 2.43(1)(p) or (q) is barred from applying for a further BVE. This regulation change was introduced to address the situation where a person whose visa was cancelled on the basis of a breach of the code, or due to being charged or convicted of a criminal offence (2.43(p)) could immediately apply for (and potentially be granted) a further BVE. This is because the BVE does not include criteria for grant that go to criminal activity or other misbehaviour. In cases where new information becomes available following a cancellation decision, I may consider using my powers under s195A of the Act to grant a further BVE to a person in immigration detention where I think it is in the public interest to do so. This mechanism allows for the grant of a BVE in certain circumstances, while preventing a person who has had their visa cancelled from immediately reapplying and being granted a further BVE.

My department will be responsible for enforcing the code. The department expects to receive information about potential breaches of the code through a range of sources, including service providers, police services, other government agencies and members of the public.

Relevant considerations with regard to any alleged breach will necessarily include an assessment as to whether the information is credible and/or reliable, and whether the allegation can be linked to an individual. Each alleged breach of the code will be assessed and sanctions will be considered on a case by case basis taking into account the individual circumstances of each case. The possible sanctions are not mutually exclusive and are not expected to apply in a pre-determined order. Possible sanctions include:

- Counselling;
- Warning letter
- Temporary reductions or cessation of income support
- Consideration of visa cancellation.

IMA BVE holders who are receiving support under the CAS and/or ASAS programmes are given orientation to Australian society by their service providers. The code will reinforce information provided during these orientation sessions. The educative aspect of the code is intended to assist people to understand the behaviour expected of them while they live lawfully in the community and to encourage cooperation of authorities while they are awaiting resolution of their visa status.

In relation to information-sharing, the department has initiated information disclosure arrangements with state and territory police for the purpose of ensuring the timely reconsideration of community placement for BVE holders and community detainees who are charged with criminal offences. A memorandum of understanding is being drafted to support information sharing between the department and State and Territory police. State and Territory police have been briefed on the code and the department may receive information from police relating to code concerns.

The department is alert to the need to mitigate against the potential abuse of the code by people with malicious intent such as disgruntled neighbours or estranged family members. As previously noted, any BVE holder whose visa is cancelled as a result of a breach of the code of behaviour will be afforded procedural fairness similar to any cancellation process. The department has a strong relationship with service providers who are working with IMA BVE holders in the community. The department is advised of any adverse treatment of BVE holders as part of its regular communication with service providers. There is no evidence to suggest that the code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by the department and I would consider any appropriate action at that time.

The requirements of legal certainty and restricting the right to freedom of expression

I note that the Committee seeks clarification on whether and how the code as currently drafted satisfies the requirements of legal certainty (2.94 & 2.95).

As stated previously, the code is both an enforceable tool providing a basis for visa cancellation and an educative tool for BVE holders to make behavioural expectations clear.

The department has put in place a number of processes to ensure that the code is clearly understood prior to the need to sign the code. For example, IMAs in held and community detention have been assisted by case managers and interpreters when signing the code to ensure that they understand the code and what it contains. Supporting information explaining some of the terms in the code is being translated into twelve community languages and people in the community can seek support from the department to sign the code where necessary. In addition an initial information session has been held for IMA BVE holders who receive Community Assistance Support services or Asylum Seeker Assistance Scheme services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given particulars of those grounds and the information because of which the grounds appear to exist. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.

In addition, while the cancellation ground may be enlivened, there are a number of other sanctions that can be applied where a breach of the code has occurred, which can be tailored to suit individual circumstances and allow for flexible application. These sanctions include the use of counselling and warning letters for less serious breaches of the code, which are aimed at educating BVE holders further on the terms of the code and reinforcing behavioural expectations.

I note that the Committee also seeks information as to how standards such as 'disrespectful' and 'inconsiderate' may be considered to be appropriate thresholds for restricting the right to freedom of expression.

The code is not written in such a way as to regulate a 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. One of the important purposes of the code is to provide the opportunity for early warning and for preventative measures to be taken in relation to less than criminal matters, before more serious behavioural problems may arise. In that regard, I consider it

reasonable that BVE holders are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

# Migration Amendment (Temporary Protection Visas) Regulation 2013

*FRLI: F2013L01811*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 12 November 2013*
*PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013*
*Response dated: 20 January 2014*

## Information sought by the committee

3.148 The committee sought a range of information to determine whether temporary protection visas (TPVs) were compatible with human rights.

3.149 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.

## Committee's response

3.150 The committee thanks the Minister for his response.[1]

3.151 The committee notes the regulation is no longer in effect as it was disallowed in full on 2 December 2013. The committee understands that TPVs were issued to 22 individuals prior to the disallowance of the regulation.

3.152 The committee notes that, subsequent to the disallowance, the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (UMA Regulation) was introduced to reinstate the outcome that was sought to be achieved by the TPV Regulation, namely to prevent unauthorised arrivals from accessing the permanent protection visa regime under the *Migration Act 1958*. A consequence of the UMA Regulation is that unauthorised arrivals who are found to engage Australia's protection obligations will either remain on bridging visas or be granted a Temporary Humanitarian Concern visa.

3.153 The committee notes that the TPV scheme and the new scheme share many of the same human rights concerns, albeit in the context of different visa types.[2] The committee has decided to reserve its final views on the compatibility of temporary protection visas with human rights, until it receives further information from the Minister with regard to the human rights compatibility of utilising the bridging visa scheme and/or the Temporary Humanitarian Concern visa regime for unauthorised arrivals who have been found to engage Australia's protection obligations.

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1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 8-12.

2 See the committee's comments on the UMA Regulation in the *Second Report of the 44th Parliament*, 11 February 2014, pp 127-134; and at pp 119-124 of this report.

***Migration Amendment (Temporary Protection Visas) Regulation 2013* [F2013L01811]**

From 18 October 2013, the *Migration Regulations 1994* ('the Regulations') were amended to reintroduce Temporary Protection (Subclass 785 (Temporary Protection)) visas (TPVs), which were the only protection visa (a visa that may be provided to people within Australia in respect of whom Australia has protection obligations) available to people who:

- are an unauthorised maritime arrival as described in the Act; or
- otherwise arrived in Australia without a visa; or
- were not immigration cleared on their last arrival in Australia; or
- are the member of the same family unit as a person in any of the above-mentioned categories who has been granted a Subclass 785 (Temporary Protection) visa.

At 9:46pm on 2 December 2013 the TPV Regulations were disallowed and as a result are no longer in effect. As such, this response relates only to the 22 persons granted TPVs prior to the disallowance of the *Migration Amendment (Temporary Protection Visas) Regulation 2013*.

The reintroduction of TPVs remains a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

Achieving the objective of combatting people-smuggling and discouraging people from making dangerous voyages to Australia

The purpose of applying the TPV regime to unauthorised air arrivals is to have the same approach to all unauthorised arrivals, that is, non-citizens who enter Australia without a visa that is in effect, as required by the Act. By applying the TPV regime to both air and sea arrivals, a permanent protection outcome for persons who arrive in Australia in an unauthorised manner, regardless of their mode of travel, is removed. This is consistent with the objective of combatting people-smugglers, who also operate, in a smaller number, on air routes to Australia.

Relevance of the Refugee Convention

As a party to the Refugees Convention, Australia is committed to meeting its international protection obligations arising under that Convention. However, the Refugees Convention, does not oblige Contracting States to provide permanent residence to refugees. In addition, TPVs are consistent with the international framework of safeguarding the well-being of refugees including durable solutions through supporting voluntary repatriation where a change in circumstances has made it safe to return.

Non-discrimination and protection of the family/children's rights

Article 2.1 of the International Covenant on Civil and Political Rights (ICCPR) states:

> *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 of ICCPR provides that:

> *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.*

However, not all treatment that differs among individuals or groups on any of the grounds mentioned above will amount to prohibited discrimination. The United Nations (UN) Human Rights Committee has recognised 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 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). Unlike permanent visa holders, all temporary visa holders (not just TPV holders) are not able to sponsor family members for residence in Australia. To the extent that the regulations result in differential treatment between permanent protection visa (PPV) holders and TPV holders in being unable to sponsor family members for reunification purposes, this treatment is based on reasonable and objective criteria. The criteria being applied is whether or not the individual entered Australia illegally, or applied to come to Australia via lawful means and is aimed at a legitimate purpose, that is the need to maintain the integrity of Australia's migration system and encouraging the use of regular migration pathways to enter Australia.

Family reunification and best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states that:

> *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.*

However, other considerations may also be primary considerations. While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in the best interest of an UAM to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.

The decision to reintroduce the TPV Regulations to ensure that UAMs who are IMAs or unauthorised air arrivals are not eligible for a PPV was made to discourage minors and their families from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal is also a primary consideration, in addition to the need to maintain the integrity of Australia's migration system and protect the national interest. The Australian Government considers that on balance these and other primary considerations outweigh the best interests of the child to have an ability to sponsor family members for reunification. If Australia were to provide a right of family reunification to some minors it would provide an incentive to people smugglers to target younger and more vulnerable children which would in turn place them in greater danger and separate them from their family.

Concerns relating to the ban on family reunion rights rationally connected to the objective of reducing the incentive for people, including children, from undertaking dangerous voyages

There is no right to family reunification under international law. The protection of the family unit under Articles 17 and 23 of the ICCPR does not amount to a right to enter Australia where there is no other right to do so.

The TPV Regulations were designed as part of a range of measures, which includes the Regional Resettlement Arrangements (RRA), to act as a deterrent for people making the dangerous journey by boat to Australia. TPVs meant that if someone came by boat to Australia they would not be able to sponsor their family, and the RRA means that if someone came by boat to Australia after 19 July 2013 they would not be processed or settled within Australia. These two policies were to work in conjunction to provide a disincentive for people who wish to remain united with their families by indicating that travelling to Australia via unauthorised means would not result in the reunification of their family should they choose to travel separately. Therefore, the measures would encourage those who are considering dangerous journeys to instead use regular migration pathways that allow families to migrate together, such as the visas available through the offshore humanitarian programme. Please also refer to question four above.

Additional primary considerations alluded to in the Statement of Compatibility

Relevant primary considerations include:

- seeking to prevent anyone, including minors, from taking potentially life threatening measures to achieve resettlement for their families in Australia;
- maintaining the integrity of Australia's borders and national security;
- maintaining the integrity of Australia's migration system;
- protection of the national interest; and
- encouraging regular migration.

Freedom of movement/right to non-discrimination

Articles 2 (1) and 26 of the ICCPR relating to the equality and non-discrimination are outlined in question 3.

Since 3 June 2013, all persons granted a PPV must seek permission before travelling to their home country as otherwise their visa is liable for cancellation. TPVs cease automatically if the holder departs Australia. The reintroduction of TPVs was a key element of the Government's border protection strategy to combat people smuggling, to discourage people from making dangerous voyages to Australia and to encourage the use of regular migration pathways. As such, the Government considers that the differential treatment between PPV holders and TPV holders is a reasonable measure based on objective criteria. To the extent that it may be argued to be inconsistent with the Convention it is considered a necessary and proportionate policy. TPV holders are able to voluntarily depart and return to their country of origin and family at any time, and may particularly wish to do so where circumstances in their country of origin have changed.

Unintended consequences of travel restrictions

TPVs were designed to deter people from boarding a boat to make the dangerous journey to Australia by providing a less attractive package of benefits than to those who arrive in Australia lawfully, while still remaining consistent with relevant international obligations. It is not the Government's intention to encourage family members to come via illegal means to be reunited with TPV holders. TPVs, in conjunction with a range of other measures including RRA (please also see the answer to question five above), are designed to discourage people travelling by illegal means. TPV holders are able to voluntarily depart and return to their family at any time, and enter another country where they have a right to do so or return to their country of origin, and may particularly wish to do the latter where circumstances in their country of origin have changed. However, if they choose to depart Australia, it is in the knowledge that they will not be able to re-enter on that visa.

Alternative options

Consideration has been given to a range of options relating to the conditions placed on TPVs. However, ultimately TPVs were designed to deter people from boarding a boat to make the dangerous journey to Australia and entering Australia illegally. The range of conditions applied to TPVs, including the restriction on travel, was developed to act as the strongest possible deterrent.

Holders of PPVs are able to travel to their home country in certain circumstances where they have sought permission prior to travelling. TPVs were deliberately designed to be distinguishable from PPVs and to provide a less attractive package of benefits so as to encourage the use of regular migration pathways.

Protection visas are a class of visa granted to persons who have expressly been found to engage Australia's protection obligations. Holders of other visas who do not have re-entry rights may also choose to voluntarily depart Australia even though they may in fact engage those obligations. For example, protection visa applicants who hold Bridging visas or Temporary Safe Haven visas but who choose to depart while their claims are being assessed.

Right to social security/right to an adequate standard of living

TPV holders have permission to work. For those who are unable to work, current legislative arrangements allow TPV holders to be eligible for Special Benefit and Family Tax Benefit. There are also a range of ancillary payments that are available, depending on individual circumstances.

(Note: Individual TPV holders will not qualify for all the benefits and payments listed below.)

- Double Orphan Pension
- Parental Leave Pay (Work test requirements will preclude TPV holders in costing)
- Dad and Partner Pay (Work test requirements)
- Rent Assistance
- Education Entry Payment
- Clean Energy Supplement
- Single Income Family Supplement
- Pharmaceutical Allowance
- Health Care Card
- Pensioner Concession Card
- Low Income Health Care Card
- Pension Supplement
- Remote Area Allowance
- Telephone Allowance
- Family Tax Benefit A & B
- Child Care Benefit

TPV holders also have access under existing arrangements to Medicare.

In addition, TPV holders are entitled to full employment services support. This is commensurate with support provided to permanent residents and citizens in similar circumstances. While not eligible for Settlement Services, TPV holders released from immigration detention are assisted to transition into the community through the Community Assistance Support programme, while those already in the community on BVEs are linked to mainstream services by Asylum Seeker Assistance Scheme providers.

Together, these support services and benefits are intended to ensure that TPV holders in need are able to access a similar level of services and support as permanent visa holders and members of the Australian community more broadly.

Mandatory mutual obligation requirement

Anyone accessing Special Benefit, regardless of whether they are a permanent resident or the holder of a TPV, is required to meet mandatory activity testing requirements (unless exempt) as required under the Social Security legislation. TPV holders are, however exempt from activity testing for the first 13 weeks. This is to allow time to settle into the community and commence supporting themselves.

Right to education

Article 13 of the International Covenant on Economic Social and Cultúral Rights (ICESCR) outlines those obligations to which Australia is bound as a State Party to the Covenant (subject to permissible limitations in accordance with article 4).

In Australia, school-age children – usually between 5 and 17 years old - must go to school.

- The children of TPV holders are able to access school education through public schools and through non-government schools.
- The policy on access to public schools for those IMAs granted TPVs is set by state and territory government education departments. This includes any related fees. If granted a TPV, the education and payment arrangements would be an issue for state/territory governments, in consultation with the Commonwealth Department of Education and the Council of Australian Governments on the broader education funding arrangements. In the interim arrangements have been made directly with the Department of Immigration and Border Protection (DIBP) and most of the state and territory education authorities to fund and enrol the children of TPV holders.
- TPV holders accessing non-government schools are funded via existing funding arrangements agreed between Commonwealth and State/Territory education authorities administered by the Commonwealth Department of Education.

DIBP will be assisting those families already living in the community (under community detention arrangements or on bridging visas) to continue to attend their local school. Service providers will also assist to enrol those children who are granted a TPV from detention.

Right to work

There are no conditions or work restrictions placed on TPV holders. TPV holders are able to freely participate in the labour market whilst they remain lawfully in Australia.

Right to health

Article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and requires steps to be taken to achieve the full realisation of this right.

The Government notes that TPVs offer some certainty in that a person will be able to remain in Australia for three years and if they are still owed protection obligations they will be eligible to be granted a further TPV. In addition TPV holders are entitled to access to Medicare and Australia's public health system to the same extent as PPV holders.

# Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

*FRLI: F2013L02104*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

## Information sought by the committee

3.154 This regulation was introduced to reinstate the outcome that was sought to be achieved by the Migration Amendment (Temporary Protection Visas) Regulation 2013, which had been disallowed: that is, to prevent unauthorised arrivals from accessing the permanent protection visa regime under the *Migration Act 1958*. According to the statement of compatibility, all unauthorised arrivals, even after they had been found to be refugees, would continue to remain on bridging visas.

3.155 The committee noted that the explanations provided in the statement of compatibility were deficient and sought further information to determine whether the regulation was compatible with human rights. In particular, the committee sought clarification on the following issues:

- Whether the bridging visa scheme that was intended to apply to persons who had been found to be owed protection obligations was consistent with a range of rights.
- How these amendments interacted with the changes that were introduced to the bridging visa scheme by various other instruments,[1] specifically:
    - whether unauthorised arrivals who are owed protection obligations but who remain on bridging visas would be required to sign a code of behaviour, and if so if they would be subject to the same consequences for breaching the code, including potentially being sent to an regional processing country.
    - whether their personal information would be shared with the federal and state police authorities.

1 See, Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 (F2013L02102); Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 (F2013L02105); Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218); and Migration Amendment (Disclosure of Information) Regulation 2013 (F2013L02101).

- whether their visas may be cancelled on the same grounds that currently apply to other bridging visa holders who are awaiting resolution of their immigration status.

- The type of refugee determination processes that would apply to unauthorised arrivals, in particular whether they would have access to merits review at the Refugee Review Tribunal.

3.156 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.

## Committee's response

3.157 The committee thanks the Minister for his response.[2] However, the response has not provided the information sought by the committee.

3.158 The Minister's response states:

> At the time the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was introduced it was the intention that IMAs found to engage Australia's protection obligations would remain on [bridging visas]. However a subsequent policy decision has resulted in IMAs who are refused a visa due to the Regulation and are people in respect of whom Australia has protection obligations, are being offered Temporary Humanitarian Concern (THC) visas. For further information regarding THC visas, please refer to the attached fact sheet. Where applicants refuse to accept the offer of a THC visa, their current visa status will remain. For the majority of applicants this will entail remaining on a [bridging visa]. To date, 59 IMAs have been granted THC visas.
>
> Other concerns of the Committee have been noted.

**3.159 The committee notes the factsheet on Temporary Humanitarian Concern (THC) visas attached to the Minister's response. The committee considers that the THC visa system is likely to limit a range of rights guaranteed by the UN human rights treaties and that the general information provided in the factsheet do not amount to an adequate justification as required by human rights law.**

**3.160 The committee further notes that THC visas have only been granted to 59 individuals to date and that those who refuse a THC visa will remain on a bridging visa. The questions raised by the committee regarding the application of the bridging visa scheme to people who have been found to be owed protection obligations therefore remain. The Minister's response also has not provided any**

2 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 36.

**clarification with regard to the refugee determination processes that would apply to unauthorised arrivals.**

**3.161 On the basis of the material placed before it, the committee is unable to conclude that this regulation is compatible with human rights.**

**3.162 The committee intends to write to the Minister for Immigration and Border Protection to again ask for the information sought by the committee. The committee also seeks clarification whether the THC visa scheme is compatible with human rights.**

***Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*** **[F2013L02104]**

At the time the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was introduced it was the intention that IMAs found to engage Australia's protection obligations would remain on BVEs. However a subsequent policy decision has resulted in IMAs who are refused a visa due to the Regulation and are people in respect of whom Australia has protection obligations, are being offered Temporary Humanitarian Concern (THC) visas. For further information regarding THC visas, please refer to the attached fact sheet. Where applicants refuse to accept the offer of a THC visa, their current visa status will remain. For the majority of applicants this will entail remaining on a BVE. To date, 59 IMAs have been granted THC visas.

Other concerns of the Committee have been noted.

# Temporary humanitarian concern visa

## Information for people who arrive illegally by boat or plane and seek Australia's protection

The Australian Government is committed to only granting temporary visas to people who arrive illegally by boat or plane and need Australia's protection.

Illegal arrivals who have lodged a protection visa application will have their application refused because the law has changed and they cannot be granted a permanent protection visa. Those who are found to engage Australia's protection obligations and satisfy all other requirements will be offered access to a temporary humanitarian concern visa.

### What is a temporary humanitarian concern visa?

A temporary humanitarian concern visa can only be granted where the minister decides a non-citizen has humanitarian concerns that should permit them to remain in Australia for a period of time.

### How can I apply for a temporary humanitarian concern visa?

You cannot apply for a temporary humanitarian concern visa. You must be invited to accept grant of this visa by the minister.

If the minister decides to grant this visa to you, you will first be invited to accept a temporary humanitarian stay visa which will enable the immigration department to grant you a temporary humanitarian concern visa.

### How long is a temporary humanitarian concern visa valid for?

The temporary humanitarian concern visa can be valid for up to three years. Your visa may be for a shorter amount of time as your circumstances are assessed on a case-by-case basis. Check your visa grant letter.

### What happens when my visa expires?

Your claims will need to be reassessed before your visa expires to determine whether you still need Australia's protection.

If you are found to still need Australia's protection you will be granted another temporary visa. As you arrived illegally you cannot apply for a permanent visa. If you are found to no longer be in need of Australia's protection, you are expected to return home.

### What conditions do I need to follow?

If you are granted a temporary humanitarian concern visa, you **must** follow these conditions. You:

- must not become involved in any disruptive activity, or violence, that may be a threat to the welfare of the Australian community or a group in the Australian community
- must tell the immigration department if you move and change address two days **before** moving.

### Can I work on a temporary humanitarian concern visa?

Yes, you will have permission to work.

### Can I get any support on a temporary humanitarian concern visa?

You will have access to Australia's healthcare system (Medicare) and social security benefits (Centrelink), job matching and short-term counselling for torture or trauma.

## Will I get English lessons?

Adults are able to complete any departmental funded English as a Second Language (ESL) programmes that they were participating in at the time of being granted a temporary humanitarian concern visa.

## Can my children attend school?

In Australia, school-aged children – usually between five and 17 years old – must go to school.

Any education fees and payment arrangements should be discussed with the school at the time of enrolling.

## Can I study?

Yes. You can study as you do not have any study restrictions on your visa. You will need to check with your course provider regarding enrolment fees.

## Can I bring my family from overseas to Australia on a temporary humanitarian concern visa?

No. If you hold a temporary humanitarian concern visa, you cannot bring family members through the Australian Humanitarian or Family Migration Programmes. If your family needs to seek protection they should apply through the United Nations refugee agency (UNHCR).

## Can I go overseas?

Yes, but if you leave Australia, your visa will cease and you will not be permitted to re-enter Australia unless you have another valid visa.

## Can I still apply for a permanent protection visa?

No. The government has stopped granting permanent protection visas to anyone who arrived illegally by boat or plane.

## I arrived after 19 July 2013. Can I be granted this visa instead of being transferred to a offshore processing country?

No. Everyone arriving illegally by boat after 19 July 2013 will be transferred to a offshore processing country.

## What are the Australian values I need to understand to live in the community?

Australian society values equal opportunity for everyone, regardless of their gender, race, religion or ethnic background. Australian law does not tolerate people who use words to abuse or threaten others, or who make inappropriate sexual comments. Any unacceptable and uninvited physical contact can be reported to the police.

It is important for you to learn about the laws in Australia, so that you understand your rights and duties and what actions may be against the law. It does not matter if you did not know the law, were intoxicated or made a mistake. You are responsible for your own actions and need to abide by Australian values and laws at all times.

## What if I am an unaccompanied minor?

The immigration department has special arrangements in place for all unaccompanied minors who are granted a temporary humanitarian concern visa. Depending on your circumstances, the immigration department may provide you with support with accommodation, assistance to attend school and other assistance with day to day living. Please talk to your case manager about your circumstances.

## Can I go home?

Yes. If you chose to return home permanently, you may be eligible for return support assistance through the International Organization for Migration. For more information phone **1300 116 986** or visit www.iomaustralia.org

# Migration Amendment Bill 2013

*Portfolio: Immigration and Border Protection*
*Introduced: House of Representatives, 12 November 2013*
*Status: Before Senate*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2013*
*Response dated: 28 February 2014*

## Information sought by the committee

3.163 This bill proposes to amend the *Migration Act 1958* to:

- specify that a review decision by the Refugee Review Tribunal or the Migration Review Tribunal (MRT) is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant (Schedule 1);
- specify the operation of the statutory bar on making a further protection visa application (Schedule 2); and
- make it a criterion for the grant of a protection visa that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (Schedule 3).

3.164 The committee sought a range of further information with regard to the amendments in each of these Schedules to determine whether the bill was compatible with human rights.

3.165 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.

## Committee's response

3.166 The committee thanks the Minister for his response.[1]

3.167 In light of the information provided, the committee makes no further comment on the amendments proposed in Schedule 1 to the bill. The committee notes that it would have been helpful for this information to have been included in the statement of compatibility.

3.168 The committee notes the Minister's explanations in relation to the amendments proposed in Schedule 2 to the bill. The committee retains its concerns about utilising administrative processes to deal with complementary protection claims. The committee's views on this issue are set out in its comments on the

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 2-9.

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.[2]

3.169 The committee notes that the Minister's reply has provided only a partial response to the committee's questions with regard to the amendments in Schedule 3 to the bill. The response states that the relevant information 'will be provided at a later date'.[3] The committee notes that these are key matters that go towards the compatibility or otherwise of these provisions. Without the necessary information, the committee is unable to conclude that the amendments in Schedule 3 are compatible with human rights.

**3.170 The committee has decided to defer finalising its views on the bill's compatibility with human rights, pending receipt of the Minister's full response to the issues raised by the committee in relation to the amendments in Schedule 3 to the bill.**

2 See, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, pp 45-62; and pp 51-74 of this report.

3 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 7.

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

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letters of 11 February 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Amendment Bill 2013*;
- *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*;
- *Customs Amendment (Record Keeping Requirements and Other measures) Regulation 2013* [F2013L01968];
- *Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156* [F2013L02038];
- *Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101];
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* [F2013L02102];
- *Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155* [F2013L02105]; and
- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* [F2013L02104].

My responses in respect of the above-named bills and legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
25/3/2014

***Migration Amendment Bill 2013 – Schedule 1***

Could the measures in Schedule 1 adversely affect the ability of a person to seek judicial review of a decision made by the MRT or the RRT?

Sections 477 and 477A of the Migration Act, which respectively prescribe the time limit on seeking judicial review with the Federal Circuit Court and the Federal Court, provide that the application to the court must be made within 35 days of the date of the migration decision (which includes, inter alia, a decision of the MRT or the RRT).

The 'date of the migration decision', in the case of a written decision of the MRT or the RRT, means the date of the written statement of the decision. In the case of an oral decision, it means the date of the oral statement of decision.

Clarifying that a decision on review (other than an oral decision) is taken to be made by the making of the written statement, and on the day and at the time the written statement is made, does not diminish a person's right or ability to seek judicial review of the decision. Nor does the amendment affect the existing requirement for an application to the court to be made within 35 days of the date of the written statement of the decision.

In addition, both the Federal Circuit Court and the Federal Court have the ability, under sections 477 and 477A of the Act, to extend the 35 day period if the court considers it appropriate and necessary (to grant the extension) in the interest of the administration of justice. This discretion is not in any way affected by the measures contained in Schedule 1.

Are there any consequences for failing to comply with the notification requirements in the Migration Act, including whether any time bar for exercising review rights may be lifted as a result?

Under the Migration Act, a person who is entitled to merits review of a decision must make an application to the MRT or the RRT within a prescribed, non-extendable period. The prescribed period commences from when the person is notified of the decision according to law.

In circumstances where there has been a failure to comply with the notification requirements (such as a failure to send the notification to the correct address), the person is not taken to be notified. This means that the prescribed period, or time limit, for seeking merits of the decision does not commence.

Therefore, if there has been a defective notification due to a failure to comply with the notification requirements, the person cannot be 'out of time' to seek merits review. In other words, there is no need for a mechanism to allow the time limit for seeking merits review to be lifted, because the time limit will not commence due to the defective notification.

In relation to applications for judicial review of a decision of the MRT or the RRT, as stated in the response to Question 1, the time limit for making an application to the Federal Circuit Court or the Federal Court is calculated by reference to the date of the written statement of the review decision; it is not dependent on the effectiveness of the MRT or the RRT's notification of its decision on review. In any event, where a person is out of time to seek judicial review, the court has the ability to extend the time if it considers it appropriate and necessary to do so.

What are the implications of deeming that a decision by the Minister or his delegate to refuse, cancel or revoke a visa is made on the day and time when a record of the decision is made (irrespective of whether that decision is notified to the person), and will the changes in Schedule 1 adversely affect the ability of a person to challenge the decision?

Deeming a decision by the Minister or his delegate to be made on the day and at the time when a record of the decision is made will provide clarity and certainty about when the Minister or his delegate's decision making power is exercised or spent.

This will facilitate greater administrative efficiency by enabling the Minister or his delegate to move on once a decision is made, irrespective of whether the person has been properly notified of the decision. Separating the decision making process from its effective notification will ensure that the Minister or his delegate would not be required to re-open and re-visit a decision because of a defective notification which is discovered later (which may be quite some time after the decision is already made).

Clarifying the precise moment when a decision is taken to be made by the Minister or his delegate will not affect a person's ability to challenge the decision. The person remains able to seek merits review (where it is available) or judicial review on the basis that there is a reviewable decision. The measures in Schedule 1 simply put the timing of the decision beyond doubt.

***Migration Amendment Bill 2013 – Schedule 2***

How many people are likely to be affected by the proposed bar on further Protection visa applications?

Since the SZGIZ decision was handed down on 3 July 2013, there have been over 760 repeat Protection visa applications to date. If this amendment does not proceed, the number of repeat Protection visa applications could be expected to grow significantly.

In terms of the decision in SZGIZ, there are 4 criteria on which a person could be eligible for the grant of a Protection visa:

1. by engaging Australia's protection obligations under the Refugees Convention.
2. by engaging Australia's protection obligations under complementary protection provisions.
3. by being the family member of another person who meets 1.
4. By being the family member of another person who meets 2.

If this amendment does not proceed, it would have a number of implications.

All applicants who were assessed and refused Protection visas on Refugees Convention grounds before the commencement of the complementary protection provisions on 24 March 2012, will be able to make another application on complementary protection grounds. These persons, in the majority of cases, will already have had their complementary protection claims assessed administratively through consideration of the exercise of the ministerial intervention powers, or as part of the pre-removal clearance processes. It is contrary to the Government's policy intention that they be able to have those claims assessed again through a repeat Protection visa application process.

In addition, current and future refused Protection visa applicants who will have already had their application assessed against both the Refugees Convention and complementary protection grounds, will also be able to make repeat Protection visa applications on the basis of being the family member of another person who claims to engages Australia's protection obligations under either the Refugees Convention or complementary protection grounds.

For this reason, it is not possible to quantify or even approximate the number of people who might be affected by the proposed bar on further Protection visa applications. In theory, the department may be able to estimate the number of applicants refused before 24 March 2012 who may now make further Protection visa applications. But it would not be possible to predict the behaviour of an unknown, but potentially large, group of applicants, who may now lodge further Protection visa applications on a basis that is different from the one relied upon in their previously unsuccessful application (for example, a person who previously applied unsuccessfully in their own right, may now seek to reapply as a member of the family unit of another person, and vice versa).

Have the individuals in this cohort been assessed by the department for any complementary protection claims?

Applicants who made their Protection applications on or after 24 March 2012 will have had any claims for complementary protection automatically assessed under the current criteria for the grant of a Protection visa.

Applicants who made their Protection visa applications before 24 March 2012 (on the basis of Refugees Convention only), and who have raised complementary protection claims, would also have had their complementary protection claims assessed under an administrative process. In the majority of cases this will have been through the Ministerial intervention process, or as part of a pre-removal clearance process, where the applicant was being considered for removal by the department.

Has anyone in this cohort received an alternative visa to remain in Australia as a result of the Minister exercising his discretionary powers under the Migration Act?

Yes. There are some applicants who, following a decision made before 24 March 2012 to refuse to grant them a Protection visa, were referred to the Minister for consideration under section 417 of the Migration Act, because their request for ministerial intervention met the guidelines for referral. Around 100 of these applicants are estimated to have been granted a visa by the Minister, although the department is not able to precisely quantify this cohort of applicants.

The department is continuing to refer cases to the Minister for consideration, including those refused before 24 March 2012 which were not assessed against complementary protection provisions and are therefore potentially affected by the Federal Court's decision in SZGIZ, as well as cases which are decided after 24 March 2012 (and were therefore assessed against both the Refugees Convention as well as complementary protection provisions) but which nonetheless meet the guidelines for referral.

What is the interaction between the measures in Schedule 2 and those proposed by the Migration Amendment (Regaining Control Over Australia's Protection Obligation) Bill 2013, and are these measures a consequence of the proposed repeal of the complementary protection legislation?

Whilst the measures in Schedule 2 will mean that an applicant who was refused a Protection visa before 24 March 2012 will not be able to make a further Protection visa application on the basis of complementary protection claims, the measures proposed are not a consequence of the proposed repeal of the complementary protection legislation by the Migration Amendment (Regaining Control Over Australia's Protection Obligation) Bill 2013.

The measures in that Bill and the measures in Schedule 2 are aimed at achieving different objectives.

The purpose of the Regaining Control Bill is to ensure that all Protection visa applications which are not yet decided on commencement date, and all future Protection visa applications, are decided on the basis of the Refugees Convention criterion only.

The purpose of the measures in Schedule 2 is to prevent unsuccessful Protection visa applicants from making unmeritorious repeat Protection visa applications on an alternative ground each time as a means of delaying their departure from Australia.

Even if the Regaining Control Bill is passed so that the Refugees Convention criterion becomes the only core criterion against which a Protection visa application will be assessed, it does not mean that the measures in Schedule 2 are unnecessary. This is because Schedule 2 is not just about preventing repeat Protection visa applications on complementary protection ground; it is also to prevent repeat Protection visa applications based on being a member of the family unit of another person who claims to engage Australia's protection obligations. Indeed, the latter was the reason why section 48A was introduced in the first place.

Therefore, irrespective of whether the complementary protection legislation is repealed by the Regaining Control Bill, the measures in Schedule 2 are necessary to ensure that section 48A can operate as intended to prevent the making of unmeritorious repeat Protection visa applications by unsuccessful Protection visa applicants.

***Migration Amendment Bill 2013 – Schedule 3***

Whether the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:

- Meet the 'quality of law' test;
- Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;
- Result in binding outcomes, including the power to order release if the detention is not justified;
- Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and
- Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.

A response to this question from the Committee will be provided at a later date.

Whether the bar on refugees accessing merits review by the AAT for their adverse security assessments is consistent with the right to equality and non-discrimination in article 26 of the ICCPR.

A response to this question from the Committee will be provided at a later date.

Whether and what steps have been put in place to ensure that the circumstances that were the subject of consideration by the HRC [UN Human Rights Committee] will not arise again.

A response to this question from the Committee will be provided at a later date.

Do refugees with adverse security assessments receive an individualised assessment as to whether less restrictive alternatives to closed detention are available and appropriate for their specific circumstances (including, for example, community detention or conditional release with requirements such as to reside at a specified location, curfews, travel restrictions, regular reporting or possibly even electronic monitoring), and, if not, how the absence of such individualised assessment and/or options may be considered to be a proportionate response?

When a refugee is subject to an adverse security assessment, the Australian Security Intelligence Organisation (ASIO) has assessed that it would be inconsistent with Australia's national security for a person to be granted a visa.

It has been the long standing, clear and well publicised position of the Australian Government that refugees who pose an unacceptable security risk to the Australian community and are subject to an adverse security assessment from ASIO will remain in an immigration detention facility.

My department gives careful consideration to the most suitable placement of refugees with an adverse security assessment in immigration detention. Placement decisions for refugees with an adverse security assessment are made on a case-by-case basis, taking into account the person's individual level of security risk and their care needs. Accommodation decisions are subject to regular reviews to ensure that the placement remains appropriate, including through departmental senior officer and Commonwealth Ombudsman reviews.

Accordingly, taking into account the protection of the Australian community, continued immigration detention arrangements, including detention placement options, for refugees who are the subject of an adverse security assessment from ASIO are considered reasonable, necessary and proportionate to the security risk that they are found to pose.

Are the amendments in Schedule 3 to the bill compatible with the prohibition against torture, cruel, inhuman or degrading treatment, given that they may result in the indefinite detention of a refugee who is deemed a security risk by ASIO?

The proposed amendment to section 36 of the Migration Act 1958 contained in Schedule 3 of the bill relates to Australia's obligation not to return a person who has been found to engage Australia's protection obligations back to the country where they would face persecution or significant harm.

The proposed amendment to section 36 reflects the government's position that a person who engages Australia's protection obligations but who has an adverse security assessment should not be granted a protection visa; it does not determine the management of a refugee with an adverse security assessment who engages Australia's protection obligations while their immigration status is resolved. That is a separate policy decision.

The conditions of immigration detention and the services provided to immigration detainees, including medical services, accommodation and food are designed to ensure that detainees are treated with humanity and respect for the inherent dignity of the human person. Any allegations of harm to detainees are promptly investigated and, if necessary, acted upon.

The amendments in Schedule 3 to the bill do not affect existing avenues for judicial review of the adverse security assessment from ASIO. Additionally, the amendments do not seek to restrict access to judicial review of a decision to refuse an application for a protection visa or to cancel a protection visa based on the applicant having an adverse security assessment from ASIO. Furthermore, the amendments do not affect the arrangements that are in place for the independent review of ASIO's decision to issue an adverse security assessment.

What steps have been put in place to ensure that the circumstances that were the subject of consideration by the United Nations Human Rights Committee will not arise again?

The Attorney-General is the Minister responsible for responding to adverse views of the United Nations Human Rights Committee (UN HRC). However, I am advised that the Government is currently considering its response to the UN HRC's views in this matter. While the views of the UN HRC are not binding as a matter of law, they are to be considered in good faith by the Government, and taken into account in the interpretation of Australia's obligations under the ICCPR. The Government has notified the UN HRC that it will respond as soon as possible to the UN HRC's views. It is the general practice of the Government not to publicly comment in detail while considering such views.

# Responses requiring no further comment

## Native Title (Assistance from Attorney-General) Amendment Guideline 2013

*FRLI: F2013L02084*
*Portfolio: Attorney-General*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 27 February 2014*

### Information sought by the committee

3.171 The committee was concerned that the broader eligibility criteria re-instated by the instrument for the provision of support to native title respondents may result in the participation of more parties and lead to additional length and complexity in proceedings, thus presenting additional barriers to native title claimants. The committee sought further information on the likely impact of re-instating the broadened eligibility on the ability of native title claimants to have their claims heard and resolved.

3.172 The Attorney-General's response is attached.

### Committee's response

3.173 The committee thanks the Attorney-General for his response.

**3.174 In light of the information provided, the committee makes no further comments on this instrument. The committee recommends that the government monitor the impact of the broadened eligibility criteria on native title proceedings, in particular the impact of the broadened criteria on the ability of native title claimants to have their claims heard and resolved.**

ATTORNEY-GENERAL

CANBERRA

MC14/04311

27 FEB 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

human.rights@aph.gov.au

Dear Senator Smith Dean,

Thank you for your letter dated 11 February 2014, on behalf of the Parliamentary Joint Committee on Human Rights, seeking additional information about the *Native Title (Assistance from Attorney-General) Amendment Guideline 2013* [F2013L02084] (the guideline).

As per paragraph 2.166 of the committee's *Second Report of the 44th Parliament*, additional information is provided below on the impact of re-instating the broadened eligibility criteria for the provision of support to native title respondents on the ability of native title claimants to have their claims heard and resolved.

**The committee's concerns**

The committee is concerned that the broader eligibility test enabling greater respondent assistance may result in the participation of more parties (in cases where their participation may not always be necessary) and lead to additional length and complexity in proceedings, thus presenting additional barriers to native title claimants in resolving their claims.

**Effect of the instrument on native title claimants' rights**

The policy underpinning the guideline is to promote faster and more equitable resolution of native title claims for all native title parties, including native title claimants.

Under the guideline, respondents may receive financial assistance for their legal representation costs if their interests are likely to be adversely affected in a real and significant way by the native title proceedings, or if there is likely to be a significant benefit (to them or to others) of an agreement being negotiated or a dispute being resolved (s 4.6(2), (3)). In practice, this means a broader range of respondent legal costs can be covered by a grant of legal financial assistance than under the previous guideline.

However, my department continues to assess all applications closely, and only approves assistance to a level that is considered reasonable. Grants are refused, or approved for a smaller amount than was requested, if aspects of the respondent's proposed participation in proceedings are considered to be unnecessary. For example, there is specific provision in the guideline to refuse or reduce assistance, having regard to the nature of the respondent's interest and the native title rights being claimed (s4.6(1)(d)). Assistance may also be refused if the respondent has low prospects of success (s 4.15(1)(a)) or is a vexatious litigant (s 4.15(1)(c)). Decision makers also have regard to the outcomes achieved during the previous funding period when determining a reasonable amount to approve under a new grant.

Importantly, assistance under the guideline is not means tested where respondents group together and share legal representation (s 4.6(1)(g)). This provides an incentive for respondents to coordinate and share legal representation, thus reducing the number of lawyers appearing in proceedings. By contrast, without legal financial assistance being available, there is a risk that multiple respondents with the same interests would participate individually in proceedings, either as self-represented litigants or with their own lawyer. This would have the potential to significantly increase the number of parties involved in the resolution of a claim. The guideline enables my department to demand efficiencies in the conduct of respondent participation in the native title matters it funds.

The reinstatement of a broader test for legal financial assistance reflects concerns expressed from time to time by the Federal Court during the period when the availability for legal financial assistance was limited to respondents whose interests raised only a 'new or novel' question of law. For example:

- In *Levinge and others v State of Queensland* QUD346/2006 (on 28 February 2013), Justice Rares noted that limiting financial assistance to respondents would 'impose an enormous burden on the parties, including the Commonwealth…[and] on the court [as] pastoralists should be made to appear for themselves [or] organise their own representation separately, and that's going to interfere in the orderly process of the court'.
- In the *Tagalaka People v State of Queensland* [2012] FCA 1396 (on 10 December 2012), Justice Logan noted that 'In the aftermath of *Wik Peoples v Queensland* (1996) 187 CLR 1, the Executive Government of the Commonwealth made provision for legal assistance to be provided to pastoralists in relation to native title claims. Over the time during which I have been responsible for the management of the list of native title cases in this region, I have directly observed how, in combination with responsible legal representation of applicants, via the North Queensland Land Council, of the State, via the Crown Solicitor and of other respondents, this legal assistance to pastoralists has repeatedly and beneficially contributed to the administration of justice and thus to Parliament's goal of national reconciliation in this important area of the Court's jurisdiction. Recently, it has been announced by the Attorney-General that this legal assistance to pastoralists will cease with effect from the end of this year. Such value judgments are for the Executive Government of the day to make. What I can say, based on direct experience, is that the addressing of the hitherto "unacceptably long time" for the resolution of native title cases and the recent experience of "faster and better claim resolution" to which the Attorney has made reference (Echoes of Mabo: AIATSIS Native Title Conference, 6 June 2012, Speech by the Honourable Nicola Roxon MP,

Attorney-General, http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Second%20Quarter/6-June-2012---Echoes-of-Mabo---AIATSIS-Native-Title-Conference.aspx Accessed 7 December 2012) requires a combination of responsible legal representation of all interested parties and intensive case management and proactive, targeted use of alternative dispute resolution where appropriate by the judges and registrars of this Court. There is much work yet to be done in the native title list in this State and much scope for misunderstanding and unnecessary acrimony and delay in relation to native title claims in the absence of responsible legal representation'.

- In a mediation report for the *Nyikina and Mangala* native title claim (WAD6099/1998) dated 11 April 2013, Deputy District Registrar Gilich stated that 'respondent funding should be addressed by the Commonwealth Government as a matter of urgency to maintain momentum in the mediated resolution of native title claims' and that 'due to lack of funding the pastoralists are ill informed in relation to the proceedings'.

Both the Courts and the Executive have a role in ensuring that claimants and respondents are equal before the law in the resolution of native title matters. The Courts are responsible for ensuring the *Native Title Act 1993* is administered fairly with respect to all parties and the Executive is responsible for ensuring all parties have an opportunity to access the system through the provision of legal assistance schemes that are fair and equitable.

As was noted in the statement of compatibility with human rights accompanying the instrument, the Government provides assistance to native title claimants for their legal representation through a separate scheme administered by the Department of Prime Minister and Cabinet. I note that no corresponding changes were made to this scheme (then administered by the Department for Families, Housing, Community Services and Indigenous Affairs) at the time the guidelines were amended for respondents.

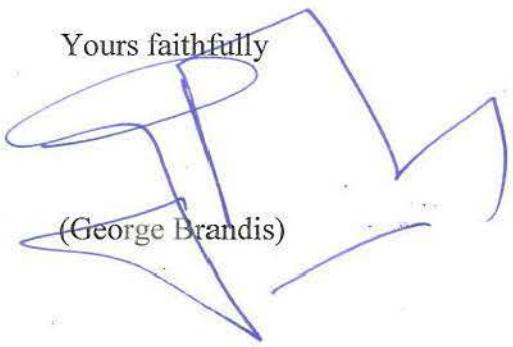
In summary, the guideline restores balance to native title financial assistance, with assistance once again provided to both parties to native title proceedings, to promote more equitable and efficient resolution of native title claims.

For the reasons set out above, I consider that the measures contained in the Native Title (Assistance from Attorney-General) Guideline 2012 are compatible with human rights, including Articles 1 and 15 of the International Covenant on Economic, Social and Cultural Rights and Articles 1 and 27 of the International Covenant on Civil and Political Rights.

The adviser responsible for this matter in my office is Liam Brennan who can be contacted on (02) 6277 7300.

Thank you again for writing on this matter.

Yours faithfully



(George Brandis)

# Social Services and Other Legislation Amendment Bill 2013

*Portfolio: Social Services*
*Introduced: House of Representatives, 20 November 2013*
*Status: Third reading agreed to by the Senate, message reported to the House*
*PJCHR comments: First Report of 44th Parliament, tabled 10 December 2013; Second Report of the 44th Parliament, tabled 11 February 2014.*
*Response dated: 24 February 2014*

## Information sought by the committee

3.175 In its *Second Report of the 44th Parliament*, the committee stated that, in the absence of information about the financial impact of transitioning certain categories of young people to youth allowance, it could not conclude that the measures in Schedule 3 of the bill limiting family tax benefit Part A to children under 16 or teenagers aged 16 to 19 in full-time secondary study (or equivalent) were compatible with the right to social security.

3.176 The committee also stated that, in the absence of information about why a phasing-in of the higher Australian Working Life Residence (AWLR) requirement for the payment of a pension outside Australia proposed by Schedule 4 of the bill was considered not possible, it could not conclude that the measure was compatible with the right to social security. In addition, the committee sought further information on the purpose and impact of the measure in Schedule 4 enabling a person who is a member of a couple paid outside Australia to have their pension calculated on the basis of their own AWLR.

3.177 The committee also sought further information as to how many people who are already overseas will be affected by the measures in Schedule 10 of the bill reducing the allowed period of temporary residence from Australia for accessing certain family and parental payments from three years to 56 weeks.

3.178 The Minister's response is attached.

## Committee's response

3.179 The committee thanks the Minister for his response.

**3.180 In light of the information provided, the committee makes no further comment on this bill.**

**The Hon Kevin Andrews MP**
**Minister for Social Services**

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*CANBERRA ACT 2600*

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MN14-000188

24 FEB 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Smith Dean,

Thank you for your letter of 11 February 2014 on behalf of the Parliamentary Joint Committee on Human Rights in relation to the *Social Services and Other Legislation Amendment Bill 2014*.

I understand that following consideration of my letter of 21 January 2014 that provided additional information on a number of schedules to the Bill, the Committee has requested further information on the Family Tax Benefit and eligibility rules provisions (Schedule 3), the period of Australian working life residence provisions (Schedule 4) and the reduction of the period of temporary absence from Australia provisions (Schedule 10). The additional information requested as outlined in the Committee's *Second Report of the 44th Parliament* is detailed below.

***Schedule 3 – Family Tax Benefit and eligibility rules***

The Committee has indicated that it requires information about the financial impact on young people and their families of restricting Family Tax Benefit (FTB) Part A to teenagers who are in secondary school.

The financial impact on both young people and their families is dependent on circumstances of the family such as family income or the presence of other FTB children in the family and whether the young person is eligible for Youth Allowance (for example, is undertaking an approved activity). The maximum rate of FTB Part A for a young person aged 16 to 17 with a Year 12 qualification is around $57 per fortnight and $2,200 per year. The maximum rate of Youth Allowance for a dependent young person aged 16 to 17, who is living at home is around $231 per fortnight or $6,006 per year.

Where a young person has parent(s) with family income of $48,837 or less, and they qualify for Youth Allowance, the young person and their family could receive $3,732 more per year (or $174.00 per fortnight) in Youth Allowance compared with the maximum rate of FTB Part A.

If the young person has parents with family income between $48,838 and $67,316 and is the only child in the family, their rate of Youth Allowance will be higher than their rate of FTB Part A, but reduced by 20 cents for every dollar earned over the income free area ($48,837). Even where the family has other FTB children in the family and is subject to both the Youth Allowance and FTB Part A parental income test, the higher rate of Youth Allowance would offset the effects of applying two income tests to their Government assistance.

Where a young person has parents with family income between $67,317 and $78,827 they may still be eligible for Youth Allowance; however, the degree of financial impact and how much less in Youth Allowance they receive compared to FTB Part A depends on where in that income scale their family income fits.

A young person may not be eligible for Youth Allowance because they are not undertaking an approved activity or because parental income exceeds the Youth Allowance parental income cut-out ($78,867 for a one Youth Allowance child family). Where a young person is not eligible for Youth Allowance, the financial impact is that they will lose entitlement to Government assistance. Under current rules that young person would be eligible for a maximum rate of FTB Part A ($2,200) until family income reached $94,316, at which point their rate of FTB Part A would be reduced by 30 cents for every dollar earned until the FTB Part A cut-off of $101,653.

***Period of Australian working life residence (Schedule 4)***

The Committee indicated that it requires information on the alternatives considered that involved phasing-in the increase in the requirement for the payment of a full pension outside Australia from 25 years to 35 years and any complexity and inequity associated with these options.

As the Committee has noted, the majority of countries do not export payments under their residence-based, social assistance schemes.

Australia, in recognition of its migrant sourced population, has chosen to make provision for its non-contributory Age Pension to be paid outside Australia indefinitely, once granted to an Australian resident in Australia. However, a former resident who left Australia before pension age cannot normally claim an Age Pension from outside Australia, even if the person was born in Australia and lived and worked here most of their life.

The UN Committee on Economic Social and Cultural Rights, in its General Comment No. 19 (the right to social security) references that ILO Convention No. 102 (1952) on Social Security (Minimum Standards), was confirmed by the ILO Governing Body in 2002 as an instrument corresponding to contemporary needs and circumstances.

Article 69 of ILO Convention No. 102 provides that:

*"A benefit to which a person protected would otherwise be entitled in compliance with any of Parts II to X of this Convention may be suspended to such extent as may be prescribed*

*(a) as long as the person concerned is absent from the territory of the Member;"*

The same exception, specifically in relation to non-contributory benefits, is contained in Article 32 of ILO Convention 128.

As there is no internationally accepted right in relation to the extraterritorial application of non-contributory social security schemes, it is suggested that the proposed measures are not incompatible with human rights.

A phased approach to introducing the measure has not been proposed because it would increase complexity, impose greater implementation costs, reduce estimated savings and delay achievement of the objective to place payment of pensions outside Australia on a more appropriate policy footing and to enhance the sustainability of Australia's social security system.

Grandfathering provisions are complicated and as proposed there are already different dates and conditions applied to the various savings provisions, dealing with pensioners outside Australia on the start date, and pensioners in Australia temporarily on the start date. Phasing in the changes would mean multiple cohorts of pensioners with different denominators and multiple grandfathered groups. This greatly increases complexity for pensioners and Centrelink staff in understanding and explaining entitlements. It also makes administrative implementation much more costly, as changes must be repeated each time.

The measures were originally announced in the 2012-13 Budget, giving affected pensioners almost two years notice of the pending changes, which has allowed those who are able to do so to change their travel plans. Any change will affect individuals in the future and the measure has been designed to minimise favouring particular cohorts over others, noting that any change will not be able to avoid this completely. For example, a person who leaves the day before the start date is advantaged over the person who leaves the next day. Phasing the arrangements would create further cohorts of people who are advantaged over the next cohort.

The Committee has also requested further clarification of the purpose and impact of the provision that results in a person who is a member of a couple paid outside Australia having their pension calculated on the basis of their own Australian working life residence, rather than the higher Australian working life residence of either partner as currently occurs.

The effect of this measure is that members of a couple who leave Australia on or after the start date for an agreement country, or claim under an Agreement from outside Australia on or after the start date will be paid based on their own Australian working life residence. This is appropriate as Australia's system is based on residence and individuals are not required to have worked, paid tax or contributions.

*The Social Security (International Agreements) Act 1999* contains provisions which are more generous than and do not align with the portability provisions of the *Social Security Act 1991*. Currently, under social security agreement legislation, each member of an age or disability support pension couple (or former member of a couple) is paid based on the Australian working life residence of whoever in the couple has the highest Australian working life residence while the same pensioners, if paid under the domestic portability legislation, would be paid based on their own Australian working life residence.

For example, a couple where one member has 25 years or more Australian working life residence and the other has 15 years are paid accordingly if they leave Australia to live in Brazil, which does not have a social security agreement with Australia (one partner receives 25/25 of their basic pension rate and the other receives 15/25 of their basic pension rate). However another couple, with the same Australian working life residence profile, who move to Chile, which does have a social security agreement with Australia, can both be paid on the basis of 25 years Australian working life residence.

The measure will address an anomaly and equity issue by ensuring that partnered pensioners paid outside Australia under social security agreements will no longer have access to a more generous rate of Australian pension than those who live in non-agreement countries.

Existing recipients being paid under agreements, who are already benefiting from this more advantageous arrangement immediately before the start date, will be grandfathered. In other words, no individuals will have a reduction in their pension rate but future affected cases will receive less than they otherwise would have.

The *Social Security International Agreements Act 1999* also provides that wife and carer payment recipients paid under agreements are to be paid based on their partners' period of Australian working life residence (whether it is higher or lower). In some cases their own Australian working life residence will be higher and this measure will enable them to receive a higher rate.

***Schedule 10 – Reduction of period for temporary absence from Australia***

The Committee has requested further information about the number of people who are already overseas who will be affected by the reduction in the period of temporary absence for FTB Part A and Paid Parental Leave from three years to 56 weeks.

Around 2,300 FTB families with around 4,400 children currently overseas will be affected following the introduction of this measure on 1 July 2014.

Thank you again for writing.

Yours sincerely

**KEVIN ANDREWS MP**

# Appendix 1

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# Full list of Legislative Instruments received between 22 and 28 February 2014

# Appendix 1: Full list of Legislative Instruments received by the committee between 22 February and 28 February 2014

The committee considers all legislative instruments that come before either House of Parliament for compatibility with human rights. This report considers instruments received by the committee between 22 and 28 February 2014, which usually correlates with the instruments that were made or registered during that period.

Where the committee considers that an instrument does not appear to raise human rights concerns, but is accompanied by a statement of compatibility that does not fully meet the committee's expectations,[1] it will write to the relevant Minister in a purely advisory capacity providing guidance on the preparation of statements of compatibility. This is referenced in the table with an '**A**' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is not accompanied by a statement of compatibility in circumstances where it was required, the committee will write to the Minister in an advisory capacity. This is referenced in the table with an '**A***' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is exempt from the requirement for a statement of compatibility this is referenced in the table with an '**E**'.

Where the committee has commented in this report on an instrument, this is referenced in the table with a '**C**'.

Where the committee has deferred its consideration of an instrument, this is referenced in the table with a '**D**'.

Where the committee considers that an instrument does not appear to raise any human rights concerns and is accompanied by a statement of compatibility that is adequate, this is referenced in the table with an unmarked square.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[2] Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

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1 The committee has set out its expectations with regard to information that should be provided in statements of compatibility in its Practice Note 1, available at: www.aph.gov.au/joint_humanrights.

2 FRLI is found online at www.comlaw.gov.au.

In relation to determinations made under the *Defence Act 1903*, the legislative instrument may be consulted at www.defence.gov.au.

**Instruments received week ending 28 February 2014**

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|---|---|
| ***Administrative Appeals Tribunal Act 1975*** | |
| Administrative Appeals Tribunal Amendment (Norfolk Island Land Valuation Decisions) Regulation 2014 [SLI 2014 No. 1] [F2014L00158] | |
| ***Australian Education Act 2013*** | |
| Australian Education (Participating States and Territories) Determination 2014 [F2014L00142] | E |
| ***Australian Prudential Regulation Authority Act 1998*** | |
| Australian Prudential Regulation Authority (confidentiality) determination No. 3 of 2014 [F2014L00184] | |
| ***Civil Aviation Regulations 1988*** | |
| Civil Aviation Order 40.3.0 Amendment Instrument 2014 (No. 1) [F2014L00145] | |
| CASA EX08/14 - Exemption — operations by paragliders in the Corryong Paragliding Open [F2014L00141] | |
| CASA EX11/14 - Exemption — Sydney Jabiru Flying School solo flight training at Bankstown Aerodrome [F2014L00162] | |
| CASA EX09/14 - Exemption — recognition of EASA type certification [F2014L00163] | |
| CASA EX12/14 – Exemption - recent experience requirements for night V.F.R. agricultural ratings [F2014L00173] | |
| ***Clean Energy Act 2011*** | |
| Clean Energy Auction Revocation Determination 2014 [F2014L00176] | |
| ***Competition and Consumer Act 2010*** | |
| Competition and Consumer Act 2010 - Monitoring of Prices, Costs and Profits Relating to the Supply of Regulated Goods by Corporations and the Supply of Goods by Liable Entities in Relation to the Carbon Tax Scheme in Australia [F2014L00180] | E |
| ***Customs Act 1901*** | |
| Customs Amendment Regulation 2014 (No. 1) [SLI 2014 No. 4] [F2014L00152] | |
| ***Environment Protection and Biodiversity Conservation Act 1999*** | |
| Amendment of List of Exempt Native Specimens - Queensland Mud Crab Fishery (19/02/2014) [F2014L00165] | |
| Christmas Island National Park Management Plan 2014-2024 [F2014L00168] | |
| Amendment of List of Exempt Native Specimens - Eastern Tuna and Billfish Fishery (24/02/2014) (deletion) [F2014L00185] | |
| Amendment of List of Exempt Native Specimens - Eastern Tuna and Billfish Fishery (24/02/2014) (inclusion) [F2014L00186] | |
| ***Financial Management and Accountability Act 1997*** | |
| Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 3] [F2014L00160] | |

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| ***Food Standards Australia New Zealand Act 1991*** | |
| Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 2, 2014 [F2014L00175] | E |
| Food Standards (Application A1081 – Food derived from Herbicide-tolerant Soybean Line SYHT0H2) Variation [F2014L00189] | E |
| ***Income Tax Assessment Act 1997 and Superannuation Guarantee (Administration) Act 1992*** | |
| Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 6] [F2014L00159] | |
| ***Migration Act 1958*** | |
| Migration Act 1958 - Determination of Eligible Passports - IMMI 13/158 [F2014L00155] | E |
| ***Migration Regulations 1994*** | |
| Migration Regulations 1994 - Specification of Eligible Education Providers and Educational Business Partners - IMMI 14/007 [F2014L00146] | E |
| ***Military Justice (Interim Measures) Act (No. 1) 2009*** | |
| Military Justice (Interim Measures) (Remuneration and Entitlements) Amendment Regulation 2014 (No. 1) [SLI 2014 No. 2] [F2014L00156] | |
| ***Military Rehabilitation and Compensation Act 2004*** | |
| Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 1) [F2014L00154] | E |
| ***National Health Act 1953*** | |
| National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 2) [F2014L00144] | |
| National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 2) [F2014L00147] | |
| National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 1) (No. PB 15 of 2014) [F2014L00171] | |
| National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 2) - PB 11 of 2014 [F2014L00183] | |
| ***Navigation Act 2012*** | |
| Marine Order 70 (Seafarer certification) 2014 [F2014L00177] | |
| Marine Order 71 (Masters and deck officers) 2014 [F2014L00178] | |
| Marine Order 72 (Engineer officers) 2014 [F2014L00179] | |
| Marine Order 73 (Ratings) 2014 [F2014L00181] | |
| ***Navigation Act 2012 and Protection of the Sea (Prevention of Pollution from Ships) Act 1983*** | |
| Marine Order 94 (Marine pollution prevention — packaged harmful substances) 2014 [F2014L00169] | |
| ***Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003 and Offshore Petroleum and Greenhouse Gas Storage Act 2006*** | |
| Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Environment Measures) Regulation 2014 [SLI 2014 No. 5] [F2014L00157] | |

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| ***Privacy Act 1988*** | |
| Credit Reporting Privacy Code (CR code) [F2014L00170] | |
| ***Private Health Insurance Act 2007*** | |
| Private Health Insurance (Prostheses) Amendment Rules 2014 (No. 1) [F2014L00172] | |
| ***Programs and Awards Statute 2013*** | |
| Higher Doctorates Rules 2014 [F2014L00164] | E |
| ***Radiocommunications Act 1992*** | |
| Radiocommunications (Spectrum Access Charges — 1800 MHz Band) Determination 2014 [F2014L00182] | |
| ***Remuneration Tribunal Act 1973*** | |
| Remuneration Tribunal Determination 2014/01 - Remuneration and Allowances for Holders of Public Office [F2014L00174] | |
| Remuneration Tribunal Determination 2014/03 - Remuneration and Allowances for Holders of Part-Time Public Office [F2014L00188] | |
| Remuneration Tribunal Determination 2014/02 - Members of Parliament - Travelling Allowance and Entitlements [F2014L00187] | E |
| ***Seat of Government (Administration) Act 1910*** | |
| National Land (Road Transport) Ordinance 2014 [F2014L00166] | |
| National Land (Parking) Repeal Ordinance 2014 [F2014L00167] | |
| ***Social Security Act 1991*** | |
| Social Security (Waiver of Debts — University of New South Wales approved course of education or study) Specification 2014 [F2014L00161] | |
| ***Torres Strait Fisheries Act 1984 and Torres Strait Prawn Fishery Management Plan 2008*** | |
| Torres Strait Prawn Fishery Total Allowable Effort Determination 2014 [F2014L00143] | |
| ***Veterans' Entitlements Act 1986*** | |
| Veterans' Entitlements (Warlike Service—Operation ARIKI) Determination 2014 [F2014L00148] | E |
| Veterans' Entitlements (Warlike Service—Operation HERRICK) Determination 2014 [F2014L00149] | E |
| Veterans' Entitlements (Warlike Service—Operation ATHENA) Determination 2014 [F2014L00150] | E |
| Veterans' Entitlements (Warlike Service—International Security Assistance Force) Determination 2014 [F2014L00151] | E |
| Veterans' Entitlements (Warlike Service—Operation ENDURING FREEDOM: Afghanistan) Determination 2014 [F2014L00153] | E |

The committee considered 49 legislative instruments