Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 1

A number of concerns have been raised in relation to the amendments that are included in this schedule.

Schedule 1 extends the current law

The amendments in Schedule 1 are not an extension of the provisions they seek to amend; rather, they aim to put the intended and longstanding operation of those provisions beyond doubt. This is in response to the Full Federal Court's decision in *MIBP v Kim* [2014] FCAFC 47, which is now the subject of an application for special leave to appeal in the High Court. This judgment was handed down since the Statement of Compatibility was prepared.

It has been successive governments' longstanding position, prior to the decision in *MIBP v Kim*, that the provisions in question operate to limit or prohibit further visa applications in circumstances where the applicant has previously been refused a visa. That is, provided the earlier visa application that was refused was in fact validly made, then the relevant application bar would apply as a matter of legal consequence.

At common law, a parent or a legal guardian has the power to make a decision on behalf of their child, provided the child does not have the capacity in their own right to make that decision. Whether a child has capacity depends upon the attainment of sufficient understanding and intelligence to understand fully what is proposed. In the migration context, an application for a visa can be made by a parent or legal guardian of a person under 18.

Similarly, where a person has an intellectual disability and is considered to not have the competence to make a decision, the discretion is vested in the person's legal guardian.

Therefore, if an application is made in the name of the child or the intellectually disabled person and signed by the child or the person's parent or guardian, it will be a valid application that is to be treated as having been made by the child or the person. So much was accepted by the Full Federal Court in *MIBP v Kim* in finding that the application made by the child applicant in that case was valid, notwithstanding that the Full Federal Court also found the applicant's lack of knowledge meant that she was not prevented from making another application in her own right.

Independent merits review of decisions to deny subsequent protection visa applications by minors and persons with a disability

There is currently no general right of merits review of a determination that a Protection visa application is invalid because the applicant is affected by the application bar in section 48A.

If a person is determined to be affected by the application bar in section 48A and disagrees with that determination, it is open to the person or their parent or guardian acting on their behalf to seek judicial review of that determination.

There is no exercise of discretion. An officer under the Migration Act makes a finding regarding the facts and the application of s48A applies by operation of law.

Obligation to consider the best interests of the child as a primary consideration

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The proposed amendments will ensure that parents cannot exploit and use their children as a means of delaying their own departure from Australia following a visa refusal, by repeatedly making visa applications on behalf of their children.

Right of the child to be heard in judicial and administrative proceedings

The amendments in Schedule 1 are aimed at achieving the objectives as set out on page 1.

When sections 48, 48A and 501E were introduced into the *Migration Act 1958* (the Migration Act), the Parliament intended that they would be engaged in respect of a person in the migration zone if all of the following conditions are fulfilled:

- there was a visa application that was made;
- the application was valid; and
- the visa had been refused.

Whether or not a visa application that has been made is valid should be decided based on an assessment of the objectively determinable criteria that have been prescribed in the Migration Act and the *Migration Regulations 1994* (the Regulations), such as whether the application was made on a prescribed application form or whether the prescribed visa application charge has been paid. It was never intended to be based on a subjective inquiry into the applicant's state of mind or, in the case of a child, whether the child has capacity to decide whether to make the application, or knows the application is being made on their behalf.

The proposed amendments in Schedule 1 would mean that a child would be prevented from making a further visa application in their own right (whether that further application relates to a Protection visa or some other visa). However, this does not mean that the child would be denied the right to be heard in a judicial or an administrative proceeding. In the case of a child who has personal protection claims, the Minister is able to intervene under section 48B of the Migration Act to enable the person acting on the child's behalf to make a further Protection visa application so that the child's personal protection claims may be assessed and their best interests would be a primary consideration. In other cases where ministerial intervention is not available, the child may seek judicial review of the decision that the purported further application is invalid, if the child, or their parent or guardian, believes that decision is wrongly decided.

In relation to the any concern that the amendments create an assumption about the validity of the visa application made by the child without consideration of the child's age, relationship with the person who made the application on their behalf, or the extent to which the application is consistent with the wish of the child, this concern is unfounded.

Where doubt exists about whether the person making the application on behalf of the child is indeed the parent or the legal guardian of the child, the department's practice is to request evidence of the person's authority to make such an application; the department does not simply accept the application made on behalf of the child as valid without query when there is such a doubt. Further, it is standard in the visa application forms to request the signatures of all applicants who are 16 years of age or over (16 years being the age accepted by Australian courts, for example in the context of medical treatment, as the age when a child attains competence). Therefore, in circumstances where an older child is included in an application and that child has signed the application form acknowledging that they have read the application and confirm the information given therein, there is some assurance that the child is aware of and consents to being included in the visa application.

Requirement to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity

Questions have also been raised about:

- whether the term 'mental impairment' includes both mental and intellectual impairment;
- how many cases involve visa applications made on behalf of persons with intellectual or mental impairment; and
- what procedures are in place for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making a decision in relation to a visa application, and the nature and the extent of any support necessary or provided to such persons.

'Mental impairment' as inserted in the proposed amendments is not defined. However, when read in their entirety, it is clear that the objective of the amendments is to ensure that a person who has been refused a visa while in Australia cannot make another application (for the same or a different visa), on the basis that they did not know about or understand the nature of the refused visa application that was made on their behalf. In this context, therefore, 'mental impairment' refers to a person's limited cognitive capacity or competence, to know and understand that they are making a visa application.

It is not possible to provide the number of cases involving applications made on behalf of persons with intellectual or mental impairment, without retrieving and physically examining all past applications. Whether or not an application is made by an intellectually or mentally impaired person – either by themselves or on their behalf – may not be something that can be easily ascertained at the time of application.

In the majority of cases the department might only become aware of the intellectual or mental disability of a visa applicant post a medical assessment for the purposes of their visa application.

Given the positive identification of a person's intellectual or mental disability may not be possible until the conduct of health checks, it may not be possible for the department to provide support to an intellectually or mentally disabled person in order that they may make an informed decision about making the application. It is also difficult for the department to provide support to such a person in making a decision on whether to continue an application already made, as such a person is almost invariably a dependent applicant in an application

made by a responsible family member or guardian. It is reasonable and appropriate to allow the responsible family member or guardian to exercise that responsibility, including making decisions about visa applications for the intellectually or mentally disabled person, without interference from the department.

As for any concern that persons with intellectual and mental impairment may be particularly vulnerable as asylum seekers and should be supported in making decisions about the lodgement of visa applications, including support to assist their understanding of the technical nature and the consequences of such an action, the department can confirm there is support in the form of government funded Immigration Advice and Application Assistance Scheme (IAAAS). Although the government has recently decided to cease the provision of IAAAS to asylum seekers who arrived in Australia illegally, many IAAAS providers continue to offer immigration assistance on a pro bono basis. In addition, the government is intending to assist a small number of vulnerable people with their primary application. The availability of IAAAS to asylum seekers who arrived in Australia legally remains unaffected. Applicants may arrange private application assistance from a registered migration agent. Applicants who have arrived lawfully and are disadvantaged and face financial hardship may be eligible for assistance with their primary application under the IAAAS.

Whilst no specific government funded support is available to intellectually or mentally disabled persons who are not asylum seekers, to the extent that support is available to such a person through their responsible family member or guardian and the department respects and allows for the exercise of this responsibility without unwarranted interference, there is no inconsistency with Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

Rights to equality and non-discrimination

The amendments in Schedule 1 are compatible with the right to equality and non-discrimination. To the extent that the amendments will restore the intended operation of sections 48, 48A and 501E so that they will apply universally and equally to every non-citizen in the migration zone who has had a validly made visa application refused while in the migration zone, the proposed amendments are compatible with the right to equality before the law and non-discrimination.

Indeed, as the Minister stated in the statement of compatibility, even if it could be said that the amendments give rise to a perception of discrimination against people who are mentally impaired, it is a perception only; the effect of the amendments are not inconsistent with Article 5(1) of the CRPD.

As there is no discrimination involved, the issue of legitimate objective, rational connection and proportionality are not relevant.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 2

Australia's non-refoulement obligations under the ICCPR and CAT

Non-refoulement obligations are provided for under the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT). An implied non-refoulement obligation is provided for under the International Covenant on Civil and Political Rights (ICCPR):

ICCPR article 7:
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

CAT article 3(1):
No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The changes in Schedule 2 modify the existing text of subsection 198(5) of the Migration Act to ensure that an application for a bridging visa in certain circumstances by a person in detention does not prevent removal. By doing so, this also prevents the possibility of those individuals remaining in detention indefinitely where they have no further immigration claims or avenues of appeal, but refuse voluntary removal and cannot currently be involuntarily removed due to an ongoing Bridging visa application.

Schedule 2 also creates subsection 198(5A), which complements subsection 198(5) and prevents an officer from removing an unlawful non-citizen from Australia if the non-citizen has made a valid application for a Protection visa (even if the application was made outside the time allowed under subsection 195(1) for these applications) and either the grant of the visa has not been refused, or the application has not been finally determined.

The government ensures compliance with its non-refoulement obligations through legislation and administrative practice.

Where certain risk factors are present, the department conducts a pre-removal clearance prior to removal. A pre-removal clearance is a risk management tool to help ensure that Australia acts consistently with its non-refoulement obligations arising under:

- the Convention and Protocol relating to the Status of Refugees (Refugees Convention);
- the ICCPR and its Second Optional Protocol; and
- the CAT.

Primarily the pre-removal clearance is used to identify whether the person has any protection claims that have not already been fully assessed. For persons who have previously had protection claims assessed by the department, the pre-removal clearance process includes consideration of any change in relevant country information or any change in the person's circumstances prior to removal, to ensure that there are no protection obligations owed by Australia and to inform removal planning and case resolution.

If it is found that an individual is affected by non-refoulement issues, that individual would not be removed from Australia. For example, if, as a result of that assessment, it is determined that not all of an individual's protection claims have been assessed, their case may be referred for the Minister's consideration under section 48B of the Migration Act.

If it is determined that an individual has not previously made protection claims, the department would check whether the person has been made aware that they can pursue the department's protection processes. Even if the individual chooses not to submit their claims through the department's protection processes, an individual would not be removed from Australia.

These processes are not impacted by the introduction of Schedule 2, and consequently do not affect Australia's non-refoulement obligations under the ICCPR and CAT.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 3

Rights to equality and non-discrimination

Article 26 of the ICCPR provides:

> *[a] all persons are equal before the law and are entitled without 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 grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The United Nations Human Rights Committee has analysed Article 26 of the ICCPR in its General Comment 18 (HRI/GEN/1/Rev 1, page 26), and stated:

> *non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic general principle relating to the protection of human rights… Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees 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.*

The issue here is whether a law that imposed a liability to pay the costs of detention on, and only on, persons convicted of people smuggling or illegal foreign fishing, would amount to discrimination on the basis of 'other status'.

The equivalent article in the European Convention on Human Rights (Article 14) also prohibits discrimination on virtually identical grounds to those listed in Article 26 of the ICCPR, including 'other status'. In Kjeldsen v Denmark (1976) 1 EHRR 711, the European Court of Human Rights held that 'status' means a personal characteristic by which persons or groups of persons are distinguishable from each other. In R (Clift) v Home Secretary [2007] 1 AC 484, the House of Lords held that the claimant's classification as a prisoner, by reference to the length of his or her sentence, and which resulted in a difference of treatment, was not a 'status' within the meaning of Article 14: 'The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.'

The legislation is not concerned with the personal characteristic or status of 'people smuggler' or 'illegal foreign fishers' but with the commission of an offence by a people smuggler or foreign fishers against a law in force in Australia. That would not be treating detainees differently on the basis of 'other status' within the meaning of Article 26 of the ICCPR. The real reason for differential treatment would not be a personal characteristic of the person concerned, but what they have done.

Right to humane treatment in detention

Article 7 of the ICCPR provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 16(1) of the CAT provides that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 14 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The effect of the measures introduced by these amendments is to ensure that liability to pay the costs of detention, transportation and removal may be enforced even after a person has served the whole or part of the sentence imposed upon them for engaging in people smuggling or illegal fishing activities. The measures extend the liability to pay these costs, which is already enforceable under section 262 of the Migration Act, to people who are or have been detained under section 189 of the Migration Act, including because of subsection 250(2), or have been granted a Criminal Justice Stay visa or any other class of visa.

While differential treatment of persons in detention may in some cases amount to a limitation on the right to humane treatment in detention, to the extent that extending liability in these amendments amounts to differential treatment of persons in detention, it does not also amount to a limitation on the right to humane treatment in detention. All persons in immigration detention, including people convicted of people smuggling or illegal fishing activities who are detained under section 250 of the Migration Act, are treated with respect for human dignity and given fair and reasonable treatment within the law.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 4

Right to a fair trial and fair hearing rights

Submissions have been received querying the compatibility of Schedule 4 to the right to a fair trial and fair hearing as provided for in Article 14 of the ICCPR. These appear to stem a concern that the proposed amendments in Schedule 4 appear to allow the department to contact a visa applicant directly and circumvent the applicant's solicitor or a migration agent (as the applicant's authorised recipient), and that this would diminish the ability of the solicitor or the migration agent to effectively represent the visa applicant and adversely affect the applicant's right to a fair trial or a fair hearing.

The amendments in Schedule 4 do not engage any rights stated in the seven core human rights treaties. The role of an authorised recipient is separate to, and distinct from, the role of a solicitor or a migration agent. Whereas a solicitor or a migration agent can act for and on behalf of an applicant on matters that fall within the scope of their authority, the role of an authorised recipient is simply to receive documents on behalf of the applicant. Put differently, a solicitor or a migration agent steps into the shoes of the applicant and is authorised to deal directly with the department, but an authorised recipient acts only as a 'post box' of the applicant. An authorised recipient may, but need not, be a solicitor or a migration agent.

Therefore, in seeking to clarify the role of an authorised recipient, the proposed amendments in Schedule 4 do not in any way affect or diminish the authority of a solicitor or a migration agent to act on behalf of an applicant. Whilst the amendments do clarify that for a 'mere authorised recipient' there is no longer a need to inform them of any direct oral communications made with the applicant (in view of the fact that their role is confined to only receiving documents), for an authorised recipient who is also the applicant's solicitor or migration agent, consistent with normal practice, the department will continue to deal with the solicitor or the migration agent instead of the applicant. To avoid doubt, this means that the solicitor or the migration agent will receive all documents from the department on behalf of the applicant (in their capacity as the applicant's authorised recipient), and will receive oral communications from the department in respect of the applicant (in their capacity as the applicant's solicitor or migration agent).

In so far as the amendments clarifying, for example, that the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT) is obliged to give documents to the review applicant's authorised recipient even when the review application is subsequently found by the relevant Tribunal not to have been validly made, and clarifying that an authorised recipient may not unilaterally vary or withdraw the notice of their appointment other than to update their own address, the amendments should not raise any human rights concerns. The former will simply ensure that a (purported) review applicant's express wish that documents be given to their appointed authorised recipient is not vitiated by technicality (i.e. a finding that the review application was not properly made) and can be lawfully complied with by the MRT or the RRT. The latter will ensure that only the applicant can vary or withdraw the notice appointing the authorised recipient, thus preventing an authorised recipient from abandoning their role by unilaterally withdrawing themselves.

The proposed amendments in Schedule 4 are technical amendments aimed only at clarifying the role of an authorised recipient, and for this reason do not engage or otherwise affect any of the rights stated in the seven core human rights treaties.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 5

Right to privacy

Schedule 5 of the Bill proposes to use the *Crimes Act 1914* (Crimes Act) search warrant material and information that is already in the possession of the Commonwealth to assess, and where appropriate, reassess, a person's visa or citizenship application. As noted in the statement of compatibility, the Schedule 5 amendments engage the right to privacy outlined in Article 17 of the ICCPR, however to the extent that these amendments limit this right, those limitations are reasonable, necessary and proportionate.

In respect of any query that it is 'unclear how decision making will be enhanced by the disclosure of information obtained under coercive powers', as previously noted by the Minister in the statement of compatibility, under the Commonwealth Fraud Control Guidelines, the department is currently responsible for the conduct of criminal investigations. Should a search warrant need to be executed in support of a criminal investigation, the department seeks agency assistance from the Australian Federal Police (AFP). Search warrant material and information gained under the search warrant is then transferred to the custody and control of departmental investigators under subsection 3ZQU(1) of the Crimes Act.

While the Crimes Act warrant material and/or information is in the custody or control of the department, without the proposed amendments in this Bill (section 51A(3) of the *Australian Citizenship Act 2007* or proposed section 488AA(3) of the Migration Act, the material and/or information cannot be used in relation to administrative decision-making.

This use of material and/or information from Crimes Act search warrants was expected, if legislated, to be used by other Commonwealth agencies as prescribed by subsection 3ZQU(2), (3) and (4) of the Crimes Act. This subsection provides that warrant material and/or information seized may be used or provided for any use that is required or authorised by or under another law of the Commonwealth. In order to maintain and enhance the integrity of the migration and citizenship programme, the government is of the view that search warrant material and/or information in the custody or control of the department should also be able to be used in administrative decisions made under the Migration Act and Regulations decision making. Should the information be relevant to a decision as outlined in the proposed amendments, it is both reasonable and proportionate to achieving the objective of enhancing the integrity of the migration and citizenship programmes.

There may be other situations where search warrant material and/or information collected, for example by the AFP without the involvement of the department, is disclosed to the department as the material and/or information is relevant to decisions outlined in the proposed amendments. As the AFP investigates serious and/or complex crime against Commonwealth laws, its revenue, expenditure and property, which can include both internal fraud and external fraud committed in relation to Commonwealth programmes, it is both reasonable and proportionate for the AFP or a Commonwealth officer to disclose search warrant material and/or information to the department for decision-making. It is also pertinent that no agency or officer can be compelled to provide search warrant material and/or information to the department.

The proposed amendments under section 51A(3) of the *Australian Citizenship Act 2007* and section 488AA(3) of the Migration Act do not alter the processes in which decisions are made and have no effect on existing procedural fairness requirements or merits review mechanisms attached to any decisions.

The Minister and the government take the matter of fraud extremely seriously and recognise that the threat of fraud is becoming more complex and the department needs the requisite tools to respond to these threats. On this basis, to the extent that the proposed amendment may impact on the right to privacy, it is both reasonable and proportionate in achieving the objective of combating fraud for search warrant material and/or information that is already in the possession of the Commonwealth to be used to assess, and where appropriate, reassess a person's visa or citizenship application.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 6

Right to a fair trial and fair hearing rights

Part 1 of Schedule 6 proposes to remove common law procedural requirements for 'offshore' visa applications and bring offshore visa applications within the scope of statutory procedural fairness requirements under section 57 of the Migration Act. An offshore visa application is one that can only be granted when the applicant is outside the migration zone and in relation to which there is no right of merits review under Part 5 or 7 of the Migration Act.

The Minister has been queried as to his assessment in the Statement of Compatibility that the proposed amendment is compatible with Article 13 of the ICCPR. Upon reflection, the Minister does not believe that Article 13 of the ICCPR is engaged by this amendment. The amendment is in connection with applications for visas that can only be granted when the applicant is offshore, so the applicant cannot be lawfully onshore at the time of grant. Therefore, questions of expulsion of those lawfully onshore do not arise.

The objective of the proposed amendment is to provide for a consistent procedural fairness framework for visa decision making. Having both statutory procedural fairness and common law procedural fairness apply depending on the type and the nature of the visa application made, increases the risk of decisions being made that are affected by a jurisdictional error due to the Minister's delegate misconstruing the character of the information in question and applying the procedural fairness requirements incorrectly.

Some public submissions have expressed the view that the common law test of requiring adverse information that is 'relevant, credible and significant' to be put to an applicant is not more difficult or onerous to apply compared to the standards set out in section 57 of the Migration Act. It could be argued that the common law test is both more onerous and conceptually more difficult for delegates to grasp and apply correctly.

For example, under section 57 it is clear that adverse information needs to be put to the applicant for comment only if, inter alia, it would be the reason, or part of the reason, for refusing to grant the visa, and most delegates instinctively understand whether or not they would be relying on the adverse information as the reason or part of the reason for refusing the visa application. Under the common law, however, a delegate is obliged to put any adverse information that is 'relevant, credible and significant' to the applicant, even in circumstances where the delegate does not intend to rely on that information as the basis for making a decision to refuse. This creates administrative burden for no apparent gain.

In addition, the concept of 'relevant, credible and significant' is very fluid and it is not always obvious whether a piece of adverse information is relevant, credible and significant. The courts have explained that 'relevant, credible and significant' information includes any issue that is critical to the decision but that is not apparent from the nature of the decision or the terms of the Migration Act and the Regulations, and any adverse conclusion that would not obviously be open on the known material. Whilst this description may seem clear, in practice many delegates struggle with this, particularly in situations where the information in question does not obviously fall within scope.

There is significant benefit in removing the distinction between 'onshore' and 'offshore' applications in so far as the application of procedural fairness is concerned. Having a single

and clear set of procedural fairness requirements that is based on legislation provides greater certainty and clarity for delegates and applicants alike, promotes efficiency and consistency in the application of procedural fairness, and reduces the risk of decisions being made that are potentially affected by a jurisdictional error. This is a legitimate objective to which the proposed amendment is rationally connected.

The amendment does not purport to remove procedural fairness requirements from 'offshore' applications altogether in the way that subsection 57(3) of the Migration Act was thought to have done prior to the High Court's decision in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23. All the amendment seeks to do is to bring 'offshore' applications in line with 'onshore' applications so that all visa applications will be subject to the same statutory procedural fairness requirements. To that extent, the proposed amendment is proportionate to the stated objective and is compatible with the right to a fair trial and fair hearing.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1

The amendments made to Public Interest Criterion (PIC) 4020 in Schedule 1 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* require that:

- an applicant satisfy the Minister as to their identity; and
- the Minister be satisfied that during the period starting 10 years before the application was made and ending when the Minister makes a decision to grant or refuse the application, neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the Minister as to their identity.

There is no human right to enter another country. In exercising the sovereign right to decide who may enter and remain in Australia by being granted a visa, the government has decided to strengthen requirements regarding identity. Issues regarding legitimate objectives, rational connection and proportionality do not apply as there is no impact on a human right. The aim is to strengthen the detection of non-genuine applicants and provide deterrence (being a 10 year exclusion period) to applicants considering identity fraud as a means to facilitate their entry into Australia. Identity fraud has consequences, not only for the department, by bringing the migration programme into disrepute, but for the Australian community. The department has a responsibility to ensure that visas are granted to genuine applicants who cooperate with the department to establish their identity. The department also has a legal responsibility, under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), to identify fraud risk and implement appropriate controls to mitigate that risk.

It should be noted that PIC 4020 applies to all skilled migration, student, business skills, family and temporary visas, but not to Refugee and Humanitarian visas. In respect of people already onshore, Articles 3 and Articles 16(1) of the CRC may be relevant. In respect of Article 3, the best interests of the child are a primary consideration; however, these may be outweighed by other considerations, including the legitimate objective of maintaining integrity in Australia's visa system. As the ultimate aim is to keep families together, the amendments are consistent with Article 16(1) of the CRC.

Standards of the quality of law test for human rights purposes"

It has been noted that interferences with rights must have a clear basis in law, and that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible for people to understand when the interference with their rights will be justified.

For the reasons outlined above, the Minister does not not consider that the amendments interfere with human rights and thus the quality of law test for human rights purposes is not relevant.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1

Obligation to consider the best interests of the child as a primary consideration

The amendments in Schedule 1 to the Regulation are aimed at achieving the legitimate objective of preventing the entry and stay in Australia of persons who commit identity fraud. The amendments require that an applicant satisfy the Minister or his delegate as to their identity, and that the Minister or his delegate are satisfied that in the 10 years before the application was made, neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy either the Minister or his delegate as to their identity.

The reference to 'any member of the family unit' includes children of a person applying for a visa, and so the requirement for there to have been no refusal of a visa for failure to satisfy the Minister or his delegate as to their identity over the past 10 years would apply to children of persons who commit identity fraud, as well as those persons themselves.

The department recognises that there may be circumstances where children may be adversely affected by the fraudulent actions of their parents through no fault of their own. The new identity requirement in PIC 4020 means that children of persons who commit identity fraud will have the same status as, and be able to stay with, their primary caregiver, which is considered to be in their best interests. If in certain circumstances this is not the case, the Minister and the government is of the view that this would be outweighed by the legitimate objective of maintaining integrity in Australia's migration programme. As the impact on children/a family will be to keep the family together, in fact it is consistent with the principle set out in Article 16(1) of the Convention on the Rights of the Child (CRC).

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 2

Obligation to consider the best interests of the child as a primary consideration

The measures in Schedule 2 have as an objective reducing the number of unaccompanied humanitarian minors (UHMs) taking dangerous boat journeys to Australia. It is anticipated that the removal of a straightforward family reunification pathway for UHMs will reduce the likelihood of minors leaving their families and travelling to Australia alone in the hope of later being able to propose their parents and siblings relatively easily under the Humanitarian Programme. The measures help ensure that complete refugee families and others determined by the government in accordance with criteria set by the Parliament to be in need of resettlement, receive highest priority for visas. The measures also aim to reinforce public confidence in the fairness of our family reunion policies, ensuring that those who arrived legally are given first priority.

The obligation under Article 3 of the CRC is for a legislative body to treat the best interests of the child as a primary consideration in any actions concerning children. It is not in a child's best interests to undertake dangerous boat journeys to Australia in the hope of sponsoring a parent or sibling. It may be argued that for a child already in Australia reunification with their family is in their best interest. However the government has taken the view that the objective of discouraging such journeys in the first place outweighs the fact that re-unification may be in their best interests.

The measures affect a cohort of applicants whose applications are proposed by their children who arrived in Australia as unaccompanied minors and irregular maritime arrivals, and were aged under 18 at the time the applications were made. Close to 95 per cent of the minor proposers are now over 18 and beyond the scope of the CRC. As regards the small minority of proposers who are still under 18, where compelling reasons exist for giving special consideration to granting their families visas, those applications will be considered accordingly. The department has given generous extensions of time to allow affected applicants and their advisers to prepare additional information in support of their applications.

The amendments do not amount to arbitrary or unlawful interference with the family under article 17(1) of the ICCPR. The principle set out in article 23(1) of the ICCPR, that the family is entitled to protection by society and the State does not create a positive obligation to re-unite families that have chosen to separate themselves across countries.