

## Migration Amendment (Temporary Protection Visas) Regulation 2013

*FRLI: F2013L01811*

*Portfolio: Immigration and Border Protection*

*Tabled: House of Representatives and Senate, 12 November 2013*

### Summary of committee concerns

2.64 The committee notes that this instrument has ceased as it was disallowed in full on 2 December 2013.<sup>38</sup> However, the effect of the instrument ceasing is prospective only and individuals who have already been granted a temporary protection visa under these arrangements will continue to remain subject to these requirements. Therefore, given the human rights issues involved, the committee seeks further information to determine whether temporary protection visas are compatible with human rights.

### Overview

2.65 This instrument reintroduced Temporary Protection Visas (TPVs) as the only protection visa available to persons who entered Australia without a valid visa. The new arrangements commenced on 18 October 2013 and applied to boat and air arrivals alike. This included unauthorised air and boat arrivals already in Australia who had an existing application for a permanent protection visa on foot. Permanent protection visas remain available to people from outside this cohort, that is, those who enter Australia with a valid visa.

2.66 The key features of the TPV arrangements include the following:

- A TPV lasts for a maximum of three years unless a shorter period is prescribed by the Minister. A person may re-apply for and be granted another three-year TPV if they continue to meet the criteria for engaging Australia's protection obligations.
- A TPV holder is not eligible to apply for a permanent protection visa, which allows a person to live and work in Australia as a permanent resident, unless the Minister is satisfied that it is in the 'national interest' to grant one.
- A TPV-holder has the right to work and to selected support services.<sup>39</sup> Pending arrangements with state and territory governments, children will have access to public education.<sup>40</sup>

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38 As a result of the disallowance, the government is barred from re-introducing a substantially same instrument for six months.

39 Statement of compatibility, p 1.

40 Statement of compatibility, p 1.

- A TPV automatically lapses if the person travels outside Australia for any reason, including visiting family.
- A TPV holder has no access to family reunion. TPV holders are not allowed to sponsor family members through either the humanitarian program or the family stream of the migration program.

## **Compatibility with human rights**

### ***Statement of compatibility***

2.67 The instrument was accompanied by a statement of compatibility that states that it engages the right to protection of the family;<sup>41</sup> children's rights,<sup>42</sup> and the right to freedom of movement<sup>43</sup>. The statement discusses the issues raised and concludes that the TPV regime re-introduced by this instrument is compatible with human rights.

2.68 The committee considers that in addition to the rights identified in the statement of compatibility, the TPV regime also engages the right to health,<sup>44</sup> the right to social security,<sup>45</sup> the right to an adequate standard of living,<sup>46</sup> the right to education,<sup>47</sup> the right to work,<sup>48</sup> and rights to equality and non-discrimination.<sup>49</sup> The committee's comments on the explanations provided in the statement of compatibility are set out below, along with the additional issues which are not addressed in the statement of compatibility.

### ***Committee view on compatibility***

2.69 The committee takes the view that in order to justify whether limitations on rights are permissible the government must demonstrate that:<sup>50</sup>

- the measure is aimed at achieving a legitimate objective;
  - there is a rational connection between the measure and the objective;
- and

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41 Article 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR)

42 Convention on the Rights of the Child (CRC).

43 Article 12 of the ICCPR.

44 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 24 of the CRC.

45 Article 9 of the ICESCR.

46 Article 11 of the ICESCR.

47 Article 13 of the ICESCR.

48 Article 6 of the ICESCR.

49 Articles 2(1) and 26 of the ICCPR and article 2(2) of the ICESCR.

50 See Parliamentary Joint Committee on Human Rights, *Practice Note 1*.

- the measure is proportionate to that objective.

2.70 The government described the reintroduction of TPVs as 'a key element of the government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia'.<sup>51</sup> The committee considers that these are legitimate objectives.

2.71 However, any restriction on rights which is aimed at achieving a legitimate objective must do so in a rational and proportionate manner. The committee notes that the government bears the onus of demonstrating that a restriction is justifiable. Such measures must be supported by evidence and a monitoring process which will assess the correctness of the assumption that the measure will contribute to achieving the goal. The justification for such limitations should be accompanied by a reasoned (and evidence-supported) explanation of why a less restrictive alternative would not be available.

2.72 In this regard, the committee notes that the justifications provided in the statement of compatibility seem to largely focus on the objectives of deterring unauthorised maritime arrivals. The statement of compatibility provides no adequate explanation as to how these measures may be justifiable with regard to unauthorised air arrivals.

**2.73 The committee intends to write to the Minister for Immigration and Border Protection to seek further information as to whether and how applying the TPV regime to unauthorised air arrivals is likely to contribute to achieving the objectives of combatting people-smuggling and discouraging people from making dangerous voyages to Australia.**

#### *Relevance of the Refugee Convention*

2.74 The committee notes that the Refugee Convention<sup>52</sup> may be relevant to the interpretation of the guarantees contained in the seven human rights treaties which constitute the committee's mandate. The former committee had the opportunity to consider the relevance of the Refugee Convention to the work of the committee.<sup>53</sup> While acknowledging that 'the [Refugee Convention is] not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee is mandated to measure the human rights compatibility of [legislation]', the former committee noted that:

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51 Statement of compatibility, p 1.

52 Australia acceded to the 1951 Convention Relating to the Status of Refugees on 17 January 1954, and acceded to its 1967 Protocol on 13 December 1973.

53 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation*.

[T]he Refugee Convention is a specialised body of law which can inform the general guarantees of the human rights treaties (and vice versa). For example: ...

- The rights of refugees to work and to access education guaranteed by the Refugee Convention may be relevant to determining whether it is permissible to limit the enjoyment of the general right to work guaranteed by article 6 of the ICESCR or to limit the access to schooling of refugee children; and
- the different treatment of refugees or asylum seekers compared with other categories of persons who may have arrived in a country without immigration permission, may give rise to issues of equality and non-discrimination, which references to the rights of refugees under the Refugee Convention might help to resolve (their status and the applicable international obligation may provide an 'objective and reasonable justification' for the differential treatment and thus be permissible differentiation).<sup>54</sup>

2.75 The committee's focus is on assessing the TPV regime against the seven human rights treaties that make up its mandate. The committee has not considered whether the TPV regime is fully consistent with Australia's obligations under the Refugee Convention. The committee, however, notes that the international refugee framework may be relevant to the question of whether any limitations on rights arising under the TPV regime are reasonable, necessary and proportionate towards achieving a legitimate objective. Measures that are consistent with accepted international standards for the treatment of refugees would be more likely to meet these requirements.

2.76 The committee notes that temporary protection is ordinarily used internationally for a mass influx of refugees, for example, of a scale as currently occurring with Syrian refugees. While the objective of preventing deaths at sea is a legitimate objective, the committee is unclear whether and how the option of open-ended temporary protection solutions as envisaged by the TPV regime falls within the scope of the three durable solutions set out in the UNHCR's *Framework for Durable Solutions for Refugees and Persons of Concern*,<sup>55</sup> comprising voluntary return, local integration or third country resettlement.

**2.77 The committee intends to write to the Minister for Immigration and Border Protection to seek further information as to whether and how TPVs are considered to fit within the internationally accepted framework of durable solutions for refugees.**

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54 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013*, pp 27-28.

55 Available at: <http://www.unhcr.org/3f1408764.html>.

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### *Protection of the family/children's rights*

2.78 Articles 17 and 23 of the ICCPR protect family rights. Article 17 of the ICCPR prohibits arbitrary interference with the family, while article 23 of the ICCPR affirms the right of families to protection by 'society and the State'.

2.79 Article 3(1) of the CRC requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.' The UN Committee on the Rights of the Child has stated that the best interests of the child principle requires:

active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.<sup>56</sup>

2.80 The CRC also requires that:

- applications for family reunification are dealt with in a positive, humane and expeditious manner;<sup>57</sup>
- unaccompanied children are provided with special protection and assistance;<sup>58</sup> and
- child asylum-seekers receive appropriate protection and humanitarian assistance.<sup>59</sup>

2.81 TPV holders have no entitlement to family reunion and cannot sponsor family members through either the humanitarian program or the family stream of the migration program. The statement of compatibility acknowledges the significant impact that the ban on family reunion may have on TPV holders:

As refugees are unable to return to their country of origin for fear of persecution, if family reunification is not available there is the potential that some [TPV] holders may be separated from their family for years until they are either deemed not to engage Australia's protection obligations

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56 UN Committee on the Rights of the Child, *General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, (2003), para 12; *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*.

57 Article 10 of the CRC.

58 Article 20 of the CRC.

59 Article 22 of the CRC.

and removed from Australia or they are granted a permanent Protection visa.<sup>60</sup>

2.82 Although stating that refugees are in a unique position of not being able to return to their home country, the statement nevertheless maintains that TPV holders will be able to 'voluntarily depart and return to their country of origin and family at any time'.<sup>61</sup> Further, the statement rejects that articles 17 and 23 of the ICCPR are applicable because:

[An unauthorised maritime or air arrival] becomes separated from their family when they choose to travel to Australia without their family, Australia has not caused that separation. To this end, Australia does not consider that Articles 17 and 23 are engaged by this Legislative Instrument.<sup>62</sup>

2.83 The statement asserts that '[t]here is no right to family reunification under international law' and that the protection of the family unit under articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so.<sup>63</sup> The statement similarly argues article 10 of the CRC, which requires applications for family reunification made by minors or their parents to be treated in a positive, humane and expeditious manner, does not amount to a right to family reunification.<sup>64</sup>

2.84 The statement acknowledges that article 3 of the CRC requires that the best interests of the child are treated as a primary consideration in all actions concerning children. However, it argues, that the TPV regime is consistent with article 3 of the CRC because 'other primary considerations' outweigh the best interests of the child:

While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in their best interests to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.<sup>65</sup>

The reintroduction of [TPVs] seeks to prevent minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interest, is also a primary consideration. Australia considers that on balance these and other primary considerations outweigh the best interests of the child in seeking family reunification. Therefore, Australia considers that this Legislative Instrument is consistent with Article 3 of the CRC.

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60 Statement of compatibility, p 2.

61 Statement of compatibility, p 2.

62 Statement of compatibility, p 2.

63 Statement of compatibility, p 2.

64 Statement of compatibility, p 2.

65 Statement of compatibility, p 2.

2.85 The committee notes that there may not be a general right of entry for persons who are not citizens or permanent residents under international law. However, as the UN Human Rights Committee has stated in a general comment on the rights of non-citizens:

The [ICCPR] does not recognise 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. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.<sup>66</sup>

2.86 If limitations on the right to a family life are to be imposed, any such limitation must be shown to be a reasonable and proportionate restriction which is rationally adapted to achieving a legitimate objective. The right to a family life must also be guaranteed equally to all without discrimination, under articles 2(1) and 26 of the ICCPR and article 2(2) of the ICESCR. The right to non-discrimination requires the demonstration of an objective and reasonable basis for any differential treatment of similarly situated persons, in this case between different categories of refugees to whom Australia owes protection obligations.

2.87 The committee considers that a general policy denying the possibility of family reunion raises issues about reasonableness and proportionality and consistency with the obligation to make the best interests of the child a primary consideration.

2.88 The committee also notes that the bar on family reunion rights may provide greater incentive for all family members (including children) to seek to travel together by unauthorised means, and thereby increase demand for people smugglers' services.

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

- **whether the ban on family reunion for TPV holders is consistent with the right to equality and non-discrimination in article 2(1) of the ICCPR and article 26 of the ICCPR;**
- **whether and how the denial of family reunion without any consideration of individual circumstances is a reasonable and proportionate measure, particularly in light of the obligation to make the best interests of the child a primary consideration; and**

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66 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, (1986), para 5.

- **whether the ban on family reunion rights is rationally connected to the objective of reducing the incentive for people, including children, from undertaking dangerous voyages.**

**2.90** The committee also seeks clarification with regard to the additional primary considerations alluded to in the following statement in the statement of compatibility: **'Australia considers that on balance these and other primary considerations outweigh the best interests of the child in seeking family reunification'<sup>67</sup>.**

*Freedom of movement/right to non-discrimination*

2.91 The right to freedom of movement is protected in article 12 of the ICCPR, which provides that:

2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

2.92 TPV holders will not be permitted to leave and re-enter Australia for any reason while holding the visa.

2.93 The statement of compatibility argues that '[t]he inability of a [TPV] holder to re-enter Australia is not a prohibition on departing Australia, although it may discourage [TPV] holders from choosing to depart'.<sup>68</sup> The statement justifies these restrictions on the following basis:

The potential discouraging effect of restricting travel is considered to be reasonable in the circumstances and proportionate to Australia's legitimate aim of offering protection to genuine refugees and those fearing significant harm, while also protecting the integrity of the protection visa regime.<sup>69</sup>

2.94 The statement also suggests that these restrictions are not unique to the TPV regime:

The inability to re-enter Australia is not exclusive to [TPV] holders, several other temporary visas do not allow re-entry to Australia after departure.<sup>70</sup>

2.95 The committee notes that the right to freedom of movement in article 12 of the ICCPR may not independently guarantee a person who is not a citizen or

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67 Statement of compatibility, p 2.

68 Statement of compatibility, p 3.

69 Statement of compatibility, p 3.

70 Statement of compatibility, p 3.



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permanent resident the right to leave and then return to Australia. However, a person holding a TPV is entitled to non-discriminatory treatment in the enjoyment of the right to leave Australia.<sup>71</sup>

2.96 Under article 2(1) of the ICCPR, Australia has undertaken 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.’ The status of being a TPV-holder would fall within the term ‘other status’ in article 2(1) as well as in article 26 of the ICCPR.<sup>72</sup>

2.97 Human rights standards require that different treatment of people in similar situations be justified by objective and reasonable criteria; it must be a reasonable and proportionate measure that rationally pursues an objective that is legitimate under the ICCPR. Permitting other recognised refugees (for example those who arrived with a visa before seeking asylum) to leave and return to Australia while denying this right to TPV holders raises issues of discrimination on the ground of ‘other status’.

2.98 The committee also notes that, as with the ban on family reunion rights, the blanket travel restrictions imposed by the TPV regime may provide greater incentive for all family members (including children) to seek to travel together by unauthorised means, and thereby increase demand for people smugglers’ services.

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

- **whether the blanket restrictions on a TPV holder’s right to leave and re-enter Australia is consistent with the right to equality and non-discrimination in article 2(1) of the ICCPR and article 26 of the ICCPR;**
- **whether and how the imposition of a blanket ban on overseas travel is rationally connected to the objective of reducing deaths at sea, given that it may have the unintended consequence of encouraging family members to come via unauthorised means to be reunited with the TPV holder;**
- **whether consideration has been given to a model which would permit a TPV holder to travel overseas in compelling or compassionate circumstances and why this lesser restrictive option could not be made available; and**
- **whether the other classes of temporary visas mentioned in the statement of compatibility, which do not allow re-entry to Australia**

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71 See also Parliamentary Joint Committee on Human Rights, *Third Report of 2013*, p 39.

72 See also Parliamentary Joint Committee on Human Rights, *Third Report of 2013*, p 39.

**after departure, involve circumstances where the visa holder is owed protection obligations by Australia.**

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

2.100 The rights to social security and an adequate standard of living are protected in articles 9 and 11 of the ICESCR, respectively. The UN Committee on Economic, Social and Cultural Rights has stated that social security should be available, adequate and accessible. Adequacy means that:

... the benefits must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the [ICESCR]. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.<sup>73</sup>

2.101 The statement of compatibility notes that TPV holders will have access to 'selected support services' and that '[p]rotection visas receive greater access to benefits and services than other temporary visa holders'.<sup>74</sup> No further information is provided and the issue of whether the supports provided to TPV holders are considered to be consistent with the right to social security and the right to an adequate standard of living is not addressed in the statement of compatibility.

2.102 As the former committee has noted, human rights concerns will arise if the total support package available to disadvantaged individuals is not sufficient to satisfy minimum essential levels of social security as guaranteed in article 9 of the ICESCR and the minimum requirements of the right to an adequate standard of living in Australia as guaranteed in article 11 of the ICESCR.<sup>75</sup>

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

- **the types and extent of social security benefits (including income support) that are available to TPV holders;**
- **whether TPV holders have access to settlement services and supports; and**

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73 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security*, (2008), para 22.

74 Statement of compatibility, p 1.

75 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013 and Fifth Report of 2013: Final Report on the Social Security Legislation Amendment (Fair Incentives to Work) Act 2012*.

- **whether and how the combination of the supports and benefits available to TPV holders is sufficient to ensure minimum essential levels of social security as guaranteed in article 9 of the ICESCR and the minimum requirements of the right to an adequate standard of living in Australia as guaranteed in article 11 of the ICESCR.**

**2.104 The committee also seeks clarification as to whether TPV holders would be expected to satisfy a ‘mandatory mutual obligation requirement’ in exchange for income support.<sup>76</sup>**

*Right to education*

2.105 The right to education is contained in article 13 of the ICESCR. It encompasses all levels of education, from primary to higher education. Its most rigorous elements relate to primary education, which must be compulsory and provided free of charge to every child within a State’s jurisdiction. Access to public educational institutions and facilities must be provided on a non-discriminatory basis. As noted above, the right of refugees to education is also protected under the Refugee Convention.

2.106 The statement of compatibility states that there are ‘pending arrangements with state and territory governments’ to provide access to public education to the children of TPV holders. However, no further information is provided as to whether and how the right to education of TPV holders will be respected.

**2.107 The committee intends to write to the Minister for Immigration and Border Protection to seek further information regarding the arrangements for ensuring that TPV holders and their children have access to adequate and accessible education, without discrimination. In particular, the committee seeks clarification whether there are interim arrangements in place to address the education needs of TPV children while arrangements are still pending with state and territory governments.**

*Right to work*

2.108 Article 6 of the ICESCR guarantees the right to work, including non-discriminatory access to work.

2.109 The statement of compatibility states that TPV holders will have access to work rights and does not address this issue any further.<sup>77</sup>

2.110 The committee welcomes the statement that TPV holders will be granted work rights. However, the committee notes that according to information available

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76 See the Coalition’s election policy, available at: <http://www.nationals.org.au/Portals/0/2013/policy/ClearLabor30000BorderFailureBacklog.pdf>, (accessed on 1 December 2013).

77 Statement of compatibility, p 1.

on the Department of Immigration and Border Protection's website, conditions may be placed on a TPV holder's right to work.<sup>78</sup> The details of what these conditions may entail are not specified.

**2.111 The committee intends to write to the Minister for Immigration and Border Protection to seek further information regarding the types of conditions or work restrictions that may be placed on a TPV holder and whether these conditions are consistent with the right to work in article 6 of the ICESCR.**

*Right to health*

2.112 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.

2.113 As the former committee has noted:

Under the previous TPV regime, commentators and studies indicated that the uncertainty involved in living under a TPV regime, especially when combined with conditions preventing family reunion and the impossibility of visiting family living outside Australia, may have significantly adverse effects on the mental health of TPV holders and their families.<sup>79</sup>

2.114 Commentators have suggested that the 'negative impacts may be amplified' under the current TPV regime as it does not provide any prospect of permanent residency.<sup>80</sup>

2.115 The statement of compatibility makes no reference to these issues and contains no discussion on the potential for the TPV regime to negatively impact on the right to health.

**2.116 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the TPV regime is consistent with the right to health.**

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78 Department of Immigration and Border Protection, *Temporary Protection Visas: Information for people who arrive illegally by boat or plane intending to seek Australia's protection*, available at: <http://www.immi.gov.au/ima/en/arrived/temporary-protection-visas/>, (accessed on 1 December 2013).

79 Parliamentary Joint Committee on Human Rights, *Third Report of 2013*, p 40.

80 See, Harriet Spinks, *A return to Temporary Protection Visas?*, Flagpost, Information and Research from Australia's Commonwealth Parliamentary Library, 18 November 2013.