

Migration Amendment Regulation 2013 (No. 4)

FRLI: F2013L01014

Portfolio: Immigration and Border Protection

Tabled: House of Representatives, 18 June 2013 and Senate, 19 June 2013

Summary of committee concerns

2.117 The committee requires further information to determine whether this instrument is compatible with human rights.

Overview

2.118 A bridging visa subclass 070 is ordinarily issued to individuals who are in immigration detention and whose removal from Australia is not practicable at the time. A bridging visa subclass 070 is normally granted using the Minister's non-delegable, non-compellable public interest power under section 195A of the *Migration Act 1958* to grant a visa to a person in immigration detention.

2.119 This instrument amends the *Migration Regulations 1994* to prescribe a new class of persons to whom the Minister may grant a bridging visa subclass 070 under the Migration Act. The explanatory statement describes this new class of persons as comprising individuals:⁸¹

- who do not currently hold a visa;
- who are not in immigration detention (and therefore outside the power of the Minister to grant a visa under section 195A of the Migration Act); and
- whose removal from Australia is not practicable at the time.

2.120 The amendments create a number of new mandatory visa conditions to apply to this new class of persons. These include:

- providing notification to the Minister of any change to the visa holder's personal details, including contact information;
- requiring approval by the Minister of employment involving chemicals of security concern, occupations in the aviation or maritime industries, or occupations involving the handling of security-sensitive biological agents.
- providing notification to the Minister of any changes of employment;
- refraining from engaging in activities considered prejudicial to security, within the meaning of section 4 of the *Australia Security Intelligence Organisation Act 1979*;

81 Explanatory statement, attachment C, p 2.

- refraining from acquiring weapons and explosives and certain material or documentation relating to weapons and explosives;
- requiring approval by the Minister to undertake flight training or to fly an aircraft;
- not communicating or associating with entities listed under Part 4 of the *Charter of the United Nations Act 1945* or with organisations prescribed by the *Criminal Code Regulations 2002*;
- requiring approval by the Minister to acquire certain goods relating to chemicals of security concern;
- complying with a direction by the Minister to attend any interview related to their visa, including an interview with Australia Security Intelligence Organisation;
- refraining from taking up employment that involves the use of, or access to, weapons or explosives; and
- refraining from undertaking certain activities which relate to weapons and explosives.

Compatibility with human rights

Statement of compatibility

2.121 The instrument is accompanied by a statement of compatibility that identifies that the mandatory visa conditions introduced by these amendments engage and limit a range of rights, including the right to privacy,⁸² the right to freedom of movement,⁸³ the right to freedom of association,⁸⁴ and the right to work.⁸⁵

2.122 The statement includes a general discussion of the issues raised and provides the following assertion to justify the imposition of the mandatory visa conditions:

It is necessary to ensure that, should a decision be made to grant visas to persons who represent a risk to the security of Australia, conditions can be imposed which manage any risk which may be posed to the safety of the Australian community. The existing visa conditions do not achieve this. Without these new conditions it is less likely that a decision will be made to grant visas to members of this cohort, which means it is less likely that they will be released from immigration detention.⁸⁶

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

83 Article 12 of the ICCPR.

84 Article 22 of the ICCPR.

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

86 Statement of compatibility, p 3.

2.123 The statement concludes that the instrument is compatible with human rights because to the extent that it 'limits the human rights of non-citizens who are a risk to Australia's security, those limitations are reasonable, necessary and proportionate to the legitimate aims of protecting Australia and the Australian community from national security risks'.

2.124 The committee's concerns with regard to this instrument and with the quality of the statement of compatibility are set out below.

Committee view on compatibility

2.125 The committee agrees that the instrument imposes limitations on a range of rights, as identified in the statement of compatibility. However, the committee is unable to assess the compatibility or otherwise of this instrument as it has been unable to ascertain some important threshold questions due to the inadequacy of the information provided in the statement of compatibility and related explanatory material. In particular, the committee has been unable to ascertain the following key information:

- The particular cohort to whom these amendments apply, that is, whether these are individuals who are currently in immigration detention. The information provided in the explanatory statement and the statement of compatibility appears contradictory: the explanatory statement suggests that these are individuals who are not currently in immigration detention,⁸⁷ while the statement of compatibility implies that they are being currently detained.⁸⁸
- The basis for concluding that this class of persons poses a security risk. The statement of compatibility makes the assertion that the restrictions imposed are justifiable on security grounds but provides no explanation as to why this class of persons is considered to pose a security risk.

2.126 The committee notes that amendments to migration legislation often involve complex and technical interactions with the Migration Act and a range of secondary legislation. It is not sufficient for the statement of compatibility and other explanatory material accompanying such changes to simply identify and repeat the effect of these interrelated provisions without providing a plain English description of their precise impact and scope.

2.127 As set out in the committee's Practice Note 1, the committee expects statements of compatibility to set out adequate justifications for limitations on rights, which involves identifying whether the restrictions are aimed at a legitimate objective, and whether those restrictions are reasonable, necessary and proportionate to that objective. Regrettably, the statement of compatibility for these

87 Explanatory statement, attachment C, p 2.

88 Statement of compatibility, p 3.

amendments merely repeats the effect of the provisions and does not explain the necessity for imposing the prescribed set of mandatory conditions on this particular class of persons. Without this information, the committee is unable to assess whether the measures introduced by these amendments represent proportionate restrictions on the range of rights identified in the statement of compatibility.

2.128 The committee intends to write to the Minister for Immigration and Border Protection to:

- **seek clarification whether the amendments apply to persons who are currently in immigration detention; and**
- **request an explanation as to why this particular cohort is considered to pose a security risk, including whether such a risk applies to the entire cohort.**