

Migration Regulations 1994 - Specification under subclauses 8551(2) and 8560(2) - Definition of Chemicals of Security Concern

FRLI: F2013L01185

Portfolio: Immigration and Border Protection

Tabled: House of Representatives, 12 November 2013 and Senate, 28 June 2013

Summary of committee concerns

2.129 The committee seeks clarification on whether the instrument is compatible with the right to work and the right to equality and non-discrimination.

Overview

2.130 This instrument specifies chemicals that are of security concern that have been identified by the Council of Australian Governments.

2.131 The instrument operates to require that eligible non-citizens who hold a subclass 070 Bridging visa must obtain approval from the minister before taking up employment in an occupation that involves the use of, or access to, chemicals of security concern and before acquiring chemicals of security concern.

2.132 The regulations and this instrument include materials used 'in the retail, pharmaceutical or pool and spa sectors, that could be diverted from their lawful use to other purposes such as terrorist-related activities', and 'agricultural and veterinary chemicals that could be diverted from their lawful use to other purposes, including terrorist-related activities.'⁸⁹

Compatibility with human rights

Statement of compatibility

2.133 The committee notes that this instrument is exempt from the requirement to provide a statement of compatibility as this regulation is not defined as a disallowable legislative instrument within the meaning of section 42 of the *Legislative Instruments Act 2003*.⁹⁰ The committee's scrutiny mandate, however, is not limited to the section 42 definition and extends to all legislative instruments.⁹¹

89 *Migration Regulations 1994*, Schedule 8, subclauses 8551(2) and 8560(2).

90 Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires statements of compatibility only for legislative instruments within the meaning of section 42 of the *Legislative Instruments Act 2003*.

91 See section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Committee view on compatibility

Right to work and right to equality and non-discrimination

2.134 The right to work is contained in article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and provides the right of all people to have the opportunity to gain their living by work they freely choose, allowing them to live in dignity. The right to work is to be made available in a non-discriminatory way.

2.135 Article 26 of the International Covenant on Civil and Political Rights (ICCPR) recognises the right to non-discrimination and equal protection of the law. It prohibits discrimination in law or in practice. The right to non-discrimination is also protected in article 2(2) of the ICESCR. The grounds of prohibited discrimination are not closed, and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A clearly definable group of people linked by their common status is likely to fall within the category of 'other status'.⁹² A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

2.136 The regulations provide simply that the holder must obtain the Minister's approval before taking up employment in the occupations specified, but do not provide any specific indication as to the factors that the Minister must take into account when deciding whether or not to grant approval.⁹³ By requiring that a person have obtained approval from the Minister before working with or acquiring specific chemicals for subclass 070 Bridging visa holders, this instrument in combination with the regulations would appear to engage and limit the right to work and the right to equality and non-discrimination.

2.137 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to whether the instrument is compatible with the right to work and right to equality and non-discrimination.

92 The UN Human Rights Committee has recognised that laws which distinguish between different categories of non-citizens engage article 26: See, for example, *Karakurt v Austria*, Communication No. 965/2000, (2002), para 8.4. See also, *General Comment No. 15: The position of aliens under the Covenant*, (1986).

93 *Migration Regulations 1994*, Schedule 8, subclauses 8551(1) and 8560(1).