

---

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

*FRLI: F2013L02102*

*Portfolio: Immigration and Border Protection*

*Tabled: Scheduled for House of Representatives and Senate, 11 February 2014*

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

*FRLI: F2013L02105*

*Portfolio: Immigration and Border Protection*

*Tabled: Scheduled for House of Representatives and Senate, 11 February 2014*

### **Summary of committee concerns**

2.49 The committee has not been able to ascertain the necessity for these measures on the basis of the information provided and considers that the explanations provided in the statement of compatibility have failed to demonstrate that they are reasonable and proportionate. In the absence of this information, the committee considers that the amendments risk authorising serious breaches of human rights.

2.50 The committee seeks the Minister's clarification on the various issues set out below as a matter of urgency so that it may finalise its consideration of these instruments while they are still before the Parliament.

### **Overview**

2.51 The Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 commenced on 14 December 2013. The committee has considered both these instruments together, given their interrelated nature.

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

2.52 The Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 amends the *Migration Regulations 1994* to establish an enforceable code of behaviour for certain Bridging E (Class WE) visa (BVE) holders.

2.53 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. As of 19 November

2013, there were some 22,900 asylum seekers who had arrived by boat who were living in the community on BVEs pending determination of their protection claims.<sup>1</sup>

2.54 The BVE cohort may also include unauthorised boat and air arrivals who have had their status determined and 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 also came into effect on 14 December 2013. As a result of those latter changes, unauthorised arrivals will be ineligible for grant of a protection visa and are expected to continue to remain on BVEs, even after being found to be refugees or to otherwise engage Australia's protection obligations.<sup>2</sup>

2.55 This regulation creates a Public Interest Criterion (PIC) that requires certain persons who hold or have held a BVE to sign a code of behaviour before a further BVE will be granted to them. The PIC applies to BVE applicants who are over 18 years old. Where the BVE holder has signed a code of behaviour, the regulation creates a visa condition that requires the BVE holder to abide by the code of behaviour that they have signed.<sup>3</sup> Further, the regulation prevents a person whose BVE has been cancelled due to criminal conduct or a breach of the code of behaviour from applying for a further BVE. The regulation also prevents a person who previously held a BVE that has been cancelled on specified grounds from applying for a further BVE.<sup>4</sup>

2.56 The regulation requires the code of behaviour to be specified by the Minister in writing but the instrument specifying the code itself is not subject to disallowance.<sup>5</sup>

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

2.57 The Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 operates to specify the required wording of the code of behaviour for applicants seeking to satisfy the criteria for the grant of a BVE.

2.58 The code sets out various directives as to what a signatory must and must not do while living in the community on a BVE. A person who breaches the code may

---

1 Mr Martin Bowles, Secretary, Department of Immigration and Border Protection, *Estimates Hansard*, 19 November 2013, p 54.

2 See further, PJCHR, Comments on the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013.

3 Visa Condition 8566, inserted by item 6 of Schedule 1 to the bill.

4 Namely, where the BVE holder (a) has been convicted of, or charged with, an offence in Australia or another country; (b) is the subject of an Interpol notice relating to criminal conduct or public safety threats; or (c) is under investigation by an agency responsible for the regulation of law enforcement or security.

5 Item 5 of Schedule 1 to the bill.

be returned to immigration detention, transferred to an offshore processing centre, or have their income support reduced or terminated.

2.59 The code, which is reproduced here in full, specifically provides as follows:

### Code of Behaviour

This Code of Behaviour contains a list of expectations about how you will behave at all times while in Australia. It does not contain all your rights and duties under Australian law. If you are found to have breached the Code of Behaviour, you could have your income support reduced, or your visa may be cancelled. If your visa is cancelled, you will be returned to immigration detention and may be transferred to an offshore processing centre.

#### While you are living in the Australian community:

- You **must not** disobey any Australian laws including Australian road laws; you **must** cooperate with all lawful instructions given to you by police and other government officials;
- You **must not** make sexual contact with another person without that person's consent, regardless of their age; you must never make sexual contact with someone under the age of consent;
- You **must not** take part in, or get involved in any kind of criminal behaviour in Australia, including violence against any person, including your family or government officials; deliberately damage property; give false identity documents or lie to a government official;
- You **must not** harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- You **must not** refuse to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes;
- You **must** co-operate with all reasonable requests from the department or its agents in regard to the resolution of your status, including requests to attend interviews or to provide or obtain identity and/or travel documents.

I, [name to be written] agree to abide by this Code of Behaviour while I am living in Australia on a Bridging E visa. I understand that if do not abide by the Code of Behaviour my income support may be reduced or ceased, or my visa may be cancelled and I will be returned to immigration detention.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## Compatibility with human rights

### *Statement of compatibility*

2.60 The Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 is accompanied by a statement of compatibility that states that the regulation engages a range of rights, including the right to equality and non-discrimination;<sup>6</sup> the right to freedom of expression;<sup>7</sup> the right to be presumed innocent until proven guilty;<sup>8</sup> the right to freedom of movement;<sup>9</sup> the right to be free from arbitrary detention;<sup>10</sup> family and children's rights;<sup>11</sup> the right not to be refouled;<sup>12</sup> the right to social security;<sup>13</sup> and the right to an adequate standard of living.<sup>14</sup> The statement's overall assessment is that 'the regulation is compatible with human rights because, to the extent that it may limit human rights, the government considers those limitations are reasonable, necessary and proportionate.'

2.61 The Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 is not accompanied by a statement of compatibility, as it is not a 'disallowable legislative instrument' subject to the statement requirement.<sup>15</sup> However, the statement of compatibility for the enabling regulation contains some discussion of the relevant human rights issues.

**2.62 While the committee welcomes the inclusion of a discussion of the human rights implications of the code of behaviour in the statement of compatibility for the amending regulation, the committee nevertheless notes that the instrument specifying the wording of the code itself is not subject to disallowance. Therefore, any modification to the standards expressed in the code will be subject to limited parliamentary scrutiny. As the committee has previously noted, it would be good practice for all legislative instruments, particularly where they limit human rights,**

---

6 Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

7 Article 19 of the ICCPR.

8 Article 14(2) of the ICCPR.

9 Article 12 of the ICCPR.

10 Article 9 of the ICCPR.

11 Articles 17(1), 23 and 24 of the ICCPR; and article 3 of the Convention on the Rights of the Child (CRC).

12 Article 3 of the Convention against Torture (CAT); and articles 6 and 7 of the ICCPR.

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

14 Article 11(1) of the ICESCR.

15 This instrument does not come within the definition of a disallowable legislative instrument under section 42 of the Legislative Instruments Act 2003 (LI Act). Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires statements for legislative instruments within the meaning of section 42 of the LI Act. The committee's mandate to examine legislative instruments, however, is not tied to the section 42 definition.

---

**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*.**

***Committee view on compatibility***

2.63 The committee notes that these measures potentially involve serious limitations on human rights, not least as they could result in the:

- continued detention of a person (since they are not granted a BVE if they fail to sign the code);
- separation of the family unit where a family member refuses to sign the code and remains in detention, whilst other family members sign the code, or are under 18 years of age, and are granted BVEs;
- re-detention of a person following cancellation of their BVE for a breach of the code;
- separation of the family unit where a family member breaches the code and is re-detained, whilst other family unit members continue to hold BVEs;
- reduction or termination of the person's income support for a breach of the code; or
- possible transfer of the person to a regional processing country as a result of their re-detention for a breach of the code.

2.64 The committee has consistently taken the view that in order to justify whether limitations on rights are permissible the government must demonstrate that:<sup>16</sup>

- the measure is aimed at achieving a legitimate objective;
- the measure is rationally connected to the objective; and
- the measure is proportionate to that objective.

2.65 Limitations on rights must also have a clear legal basis and satisfy the quality of law test.

2.66 The committee considers that the statement of compatibility accurately identifies the key rights that are engaged by these measures. However, it does not adequately demonstrate the compatibility of the measures with the identified rights. The committee's concerns are set out below.

---

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

### *Legitimate objective*

2.67 The statement of compatibility asserts that the amendments are aimed at securing public safety. The statement says that:

The Government has become increasingly concerned about non-citizens who engage in conduct that is not in line with the expectations of the Australian community. The Australian community expects that non-citizens being released into the community on Bridging E (Class WE) visas (BVE) while they wait for their claims for protection to be assessed, follow the laws and values considered important in Australian society.

There is limited ability to cancel the BVE of persons who hold or have had a BVE granted under section 195A where they have engaged in behaviour not considered acceptable by the Australian community, that is, unless the behaviour falls within the scope of existing cancellations powers within sections 116 or 501 of the Migration Act 1958 (the Act). There is also limited ability to prevent persons who have had their BVE cancelled under section 116(1)(b) or section 116(1)(g) from applying for a further BVE, including an 'associated' BVE application.

2.68 The statement of compatibility does not explain the basis for the government's concerns or its reasons for singling out BVE holders for the application of these measures. Neither does the statement explain why the existing visa cancellation framework in migration legislation is considered inadequate, nor why it is necessary to set a bar on future BVE applications if a person has their BVE cancelled.

2.69 The committee notes that the government bears the onus of demonstrating that limitations on rights are justifiable. Among other things, this involves providing a reasoned and evidence-supported explanation of why the measures in question are considered necessary. As the committee has already noted, limitations on rights must be aimed at a legitimate objective. 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.<sup>17</sup>

2.70 Objectives such as the protection of public safety are obviously legitimate. However, the committee is not satisfied that the government has provided relevant and sufficient reasons to demonstrate the necessity for these measures or their

---

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

relationship to a legitimate objective. While the statement of compatibility cites public safety objectives on various occasions, the overall thrust of the discussion in the statement and related explanatory materials appear to focus instead on the objectives of ensuring that BVE holders comply with 'community expectations'.

2.71 Even if it can be demonstrated that the amendments seek to achieve a public safety outcome, it must still be shown that there is a real need for them. The committee notes that, in addition to the general law enforcement system, there are already expansive powers in migration legislation to deal with any public safety concerns posed by BVE holders. The BVE regime was amended in 2013 to introduce enhanced powers to cancel a BVE on a broad range of grounds, including public safety reasons.<sup>18</sup> Further changes have just been introduced to permit information about BVE holders to be shared with police authorities, to enable the 'prompt consideration of visa cancellation' if BVE holders are charged with or convicted of an offence.<sup>19</sup> It is therefore not apparent why these additional measures are considered to be necessary to secure public safety. The committee notes that the Department of Immigration has suggested elsewhere that a high rate of compliance is already currently achieved under the BVE regime:

The increased use of BVEs to manage people in the community has not led to a greater non-compliance. The percentage of people complying with their BVE conditions has remained around 90 per cent.<sup>20</sup>

**2.72 The committee intends to write to the Minister for Immigration and Border Protection to seek further information on the following issues:**

- **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 Minister has concluded 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 the Minister has 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.**

---

18 Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218). The committee examined these amendments in its last report and outlined a series of human rights concerns in relation to these powers: see, PJCHR, *First Report of the 44<sup>th</sup> Parliament*, 10 December 2013, pp 103-108.

19 Migration Amendment (Disclosure of Information) Regulation 2013 (F2013L02101). See the committee's comments on this regulation elsewhere in this report.

20 Mr Martin Bowles, Secretary, Department of Immigration and Border Protection, *Estimates Hansard*, 19 November 2013, p 54.

*Rational connection*

2.73 Even if the measures are pursuing a legitimate objective such as public safety, it must still be shown that they are likely to be effective in achieving that objective. 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. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible.

2.74 The committee is unable to conclusively assess whether the measures are rationally connected to a legitimate objective without first obtaining a clearer understanding of the objectives of the amendments.

2.75 The committee notes that the code of behaviour contains directives on an assortment of issues, ranging 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. It is not immediately apparent that all of these matters have a direct connection to a public safety outcome, if that is indeed the objective of these amendments.

**2.76 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to whether and how the specific directives contained in the code of behaviour are rationally connected to achieving public safety.**

*Proportionate response*

2.77 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. 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.

2.78 The requirement for BVE holders to comply with the code of behaviour, covering a very broad range of conduct, in all their activities has the potential to limit a range of human rights and, as noted above, the consequences of breaching the code are severe. The amending regulation and the instrument specifying the code, however, provide no guidance on how the behavioural standards contained in the code are meant to be interpreted or applied. It is not clear, for example, when a breach might result in a BVE being cancelled and the person re-detained or when it might result in the person's income support being reduced or removed.



2.79 The statement of compatibility acknowledges that the code captures 'a wide range of criminal offences or general conduct'.<sup>21</sup> It argues that the measures are, nevertheless, proportionate on the basis of the following reasons:

- In relation to the option to cancel a person's BVE, the statement argues that the discretionary nature of the cancellation allows individual circumstances to be taken into account and that comprehensive policy guidance will be provided to decision-makers to ensure that the discretion is exercised in a reasonable and proportionate matter.<sup>22</sup>
  - The statement suggests that the discretion not to cancel may be used, for example, should there be grounds to consider that a charge has been improperly brought by the state. In addition, the Minister can use his power under the Migration Act to grant a BVE to a person if charges are subsequently dropped or discontinued post visa cancellation.<sup>23</sup>
  - The statement also states that a person who has their BVE cancelled will have access to both merits and judicial review.<sup>24</sup>
- In relation to any adverse impact on family and children's rights arising from the separation of family members, the statement argues that the Minister has the ability to consider granting the person a visa under his personal powers if he considers it is appropriate.<sup>25</sup> In addition, family rights and the best interests of the child would be taken into account as part of the decision as to whether to exercise the discretion to cancel the visa.<sup>26</sup>
- In relation to the option to reduce a person's income support, the statement argues that there will be strong policy guidance on the circumstances in which a reduction in income support may be appropriate and that the impact that such a reduction would have on the persons' standard of living would be considered in determining whether a reduction was appropriate.<sup>27</sup>

2.80 The committee notes that the case for proportionality put forward in the statement of compatibility broadly rests on the arguments that (i) the power to

---

21 Statement of compatibility, p 6.

22 Statement of compatibility, p 8.

23 Statement of compatibility, p 6.

24 Statement of compatibility, p 8.

25 Statement of compatibility, p 9.

26 Statement of compatibility, p 9.

27 Statement of compatibility, p 10.

sanction a BVE holder for breach of the code is discretionary and (ii) that appropriate policy guidance will be developed for the exercise of the powers.

2.81 The committee does not consider that these assurances are sufficient to guarantee that the powers will be exercised consistently with human rights. The committee notes that interferences with fundamental rights which are based solely on administrative discretion are likely to be impermissible under human rights law:

The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.<sup>28</sup>

2.82 The European Court of Human Rights has similarly stated that:

In matters affecting fundamental rights it would be contrary ... for a legal discretion to be granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.<sup>29</sup>

2.83 The committee has consistently emphasised that in undertaking its task it must necessarily determine if legislation is sufficiently confined to ensure that human rights will be adequately respected in practice. In this instance, the committee is not convinced that the amendments as drafted are suitably circumscribed to provide sufficient protection of a BVE holder's human rights, including the right not to be arbitrarily detained.

2.84 The committee does not consider that the government's reliance on (i) policy guidance, (ii) the option not to exercise the powers, and (iii) recourse to the Minister's personal and non-compellable powers is a satisfactory response, as Parliament has the opportunity to define the test appropriately on the face of the legislation. The committee considers that the power to cancel a BVE holder's visa or otherwise sanction the person for breach of the code should only be possible when the relevant decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power;
- that the exercise of the power is no more restrictive than is required in the circumstances; and
- where the sanction involves the reduction or removal of income support, that such action does not result in the destitution of the person or their family.

---

28 Human Rights Committee, General Comment 27, (1999), para 15. See also Human Rights Committee, General Comment No 34 (2011), para 25.

29 *Gillan and Quinton v UK* (Application No 415/05, 12 January 2010) at para 77.

2.85 The committee notes the claim in the statement of compatibility that the grant of a BVE is a 'privilege and not an entitlement' (because its holder would otherwise be subject to immigration detention under the Migration Act) and the suggestion that this therefore permits greater latitude for cancelling a BVE. The committee observes that Australia's human rights obligations require the government as a matter of law to ensure that individuals are not detained arbitrarily. To that end, releasing people on bridging visas while they await their protection claims to be assessed is a way of meeting those obligations by ensuring that they are not detained beyond a period that is strictly necessary and justifiable, consistent with article 9 of the ICCPR.

2.86 The committee notes that the statement of compatibility suggests that the cancellation decisions will be subject to merits and judicial review. The committee, however, queries whether this claim is fully accurate. As a result of the changes introduced by the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218), merits review will not be available if the cancellation decision is subject to a conclusive certificate by the Minister. The committee reported on these provisions in its last report.<sup>30</sup> It is also not clear whether any independent review would be available for decisions to reduce or stop a person's income support. The committee notes that the statement of compatibility only discusses the option of reducing a person's income support but the code itself presents both options.

2.87 Finally, the committee notes the absence of information with regard to the manner in which the code is to be enforced and whether appropriate safeguards are provided to ensure that its operation does not inadvertently result in the stigmatisation of BVE holders in the community.

**2.88 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:**

- **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 committee also requests information as to the specific amount of income support currently provided to BVE holders and whether BVE holders have work rights, so that it can assess the reasonableness of the option to reduce or stop the person's income support.**

---

30 See, PJCHR, *First Report of the 44<sup>th</sup> Parliament*, 10 December 2013, pp 103-108.

- **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.**

#### *Legal basis for restrictions*

2.89 Human rights standards require that interferences with rights must have a clear basis in law. This means not only that there must be a domestic rule adopted as part of the standard legislative process (or an accepted rule of the common law), but that the law or rule in question must satisfy what is known as the 'quality of law' test. The effect of this is that any measures which interfere with human rights must be sufficiently certain and accessible to allow people to understand when the interference will be justified. The provision of a legal basis for measures which impact on rights is also an important guarantee of the rule of law.

2.90 The prohibitions and requirements contained in the code of behaviour use broad and imprecise definitions. For example, it is not clear what is intended to be covered by the term 'antisocial or disruptive activities', or when behaviour may be considered 'inconsiderate' or 'disrespectful', or what threshold must be crossed for 'the peaceful enjoyment of other members of the community' to be disrupted.

2.91 The general and open-ended nature of the directives, which cover a very wide range of behaviour, raises concerns as to whether they are sufficiently precise to enable BVE holders to understand what is expected of them. There is also the risk that they may be interpreted and applied inconsistently by the relevant agencies tasked with enforcing the code.

2.92 The statement of compatibility, however, claims that:

Legislative amendments that contemplate cancellation of a visa and subsequent detention add to a number of existing laws that are well-

established, generally applicable and predictable. This will be the case also for these amendments.<sup>31</sup>

2.93 The committee considers that the code as currently drafted does not appear to satisfy the requirement of legal certainty as required by human rights law (and the common law). The committee notes that the statement of compatibility suggests that there will be 'comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a BVE'.<sup>32</sup> However, the committee is not satisfied that this meets the requirement for legal certainty as the quality of the law authorising the making of such decisions must satisfy minimum standards of foreseeability.

**2.94 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on whether and how the code as currently drafted satisfies the requirements of legal certainty.**

**2.95 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.**

---

31 Statement of compatibility, p 4.

32 Statement of compatibility, p 4.

