

## Migration Amendment (Disclosure of Information) Regulation 2013

FRLI: F2013L02101

Portfolio: Immigration and Border Protection

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

### Summary of committee concerns

2.96 The committee seeks further information to determine whether this regulation is compatible with the right to privacy and the right to non-discrimination.

### Overview

2.97 This regulation amends the *Migration Regulations 1994* to enable the Minister for Immigration and Border Protection to authorise the disclosure of personal information about the holders of Bridging E (Class WE) visas (BVE) to the Australian Federal Police or the police force of any Australian state or territory. The information that may be disclosed is the BVE holder's name, address, sex, date of birth and immigration status.

2.98 The purpose of the regulation is to support existing powers which authorise the cancellation of a BVE where the holder of the visa has been charged with or convicted of an offence. A related regulation, which strengthened powers to cancel such visas, was reported on by the committee in its last report.<sup>1</sup> A BVE may be cancelled if:<sup>2</sup>

- the person has been charged or convicted of a criminal offence in Australia or another country;
- the person is subject to an Interpol notice relating to criminal conduct or a threat to public safety or for the purpose of locating and arresting the person; or
- the head of an Australian law enforcement or a security agency has advised that a BVE holder is under investigation and should not hold that visa.

2.99 According to the explanatory statement, the disclosure of information would help federal, state and territory police services to inform the Immigration Department, as soon as reasonably practicable, that a BVE holder has been charged with a criminal offence, which would support and facilitate the department's

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1 PJCHR, Comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218), *First Report of the 44<sup>th</sup> Parliament*, 10 December 2013, pp 103-108.

2 See *Migration Act 1958*, section 116(1)(g) and Migration Regulation 1994, Regulations 2.43(1)(p) and (q).

compliance activities, specifically by allowing prompt consideration of visa cancellation.

2.100 In order to implement these changes, it is understood that the Immigration Department:

... intends to put in place formal arrangements through Memoranda of Understanding with federal, state and territory police services to cover the disclosure of the specific information and the Minister's expectations about how they will use it.

## **Compatibility with human rights**

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

2.101 The instrument is accompanied by a statement of compatibility which states that the instrument engages the right to privacy,<sup>3</sup> and the right not to be arbitrarily detained.<sup>4</sup>

2.102 The statement concludes that the instrument is compatible with human rights because, to the extent that it limits these rights, the limitation is reasonable and necessary, as it is required to assist the police to maintain public order and to support the department's compliance activities. It states that the release of information to the police about BVE holders is proportionate as the information is limited to name, address, date of birth, sex and immigration status and only applies to current BVE holders and not the holders of other visas (or to non-visa holders).

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

2.103 The committee agrees that the instrument engages the right to privacy. The committee notes that the amendments may also engage the right not to be arbitrarily detained, in so far, as the amendments enable the 'prompt consideration of visa cancellation and, therefore the possible re-detention of the BVE holder'.<sup>5</sup> In addition, the committee considers that the right to non-discrimination is also engaged.<sup>6</sup>

2.104 The committee notes that it would appear that many of the key safeguards and procedures for implementing these disclosure powers are likely to be contained in the relevant Memoranda of Understanding with the Federal, State and Territory police. The committee notes that it is difficult to assess whether these amendments are compatible with human rights in the absence of further information about the specific content of those memoranda.

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

4 Article 9 of the ICCPR.

5 Statement of compatibility, p 5.

6 Article 26 of the ICCPR.

2.105 The committee notes that the statement of compatibility contains a detailed discussion of the recommendations of the Privacy Commissioner with regard to these proposals. The statement says that the amendments are considered to be consistent with those recommendations.<sup>7</sup> The committee also notes that the Privacy Commissioner has provided feedback on the proposed Memoranda of Understanding with the Federal, State and Territory police to support the operation of these amendments and that the Immigration Department will take this feedback into account when the Memoranda are drafted with the relevant police services and police forces.<sup>8</sup>

**2.106 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the Privacy Commissioner was satisfied that the amendments as drafted are consistent with his recommendations. The committee also requests that the Minister keep the committee apprised of progress in relation to the finalisation of the relevant Memoranda of Understanding and that the committee is provided with the final documents for its information and assessment.**

#### *Right to privacy*

2.107 Article 17 of the ICCPR provides for the right not to have one's private life arbitrarily or unlawfully interfered with. The right to privacy is not absolute and may be limited if it can be demonstrated that the limitation is aimed at a legitimate objective and is reasonable, necessary and proportionate to that objective.

2.108 In this case the instrument seeks to achieve the objective of supporting the Immigrations Department's compliance activities, in that it will allow 'prompt consideration of visa cancellation',<sup>9</sup> as BVE holders charged with or convicted of an offence can be quickly identified by the police and notified to the department. This appears to seek to achieve greater administrative convenience, as sharing the information of all BVE holders with the police may enable the department to more readily identify if BVE holders are charged with or convicted of an offence. Mere administrative convenience, however, may not, in and of itself, be a legitimate objective for limiting rights.<sup>10</sup> A legitimate objective requires the demonstration of a sufficiently pressing and substantial concern.

2.109 The committee notes that the power to cancel a visa if the holder has been charged with or convicted of an offence has existed for some time in the Migration

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7 Statement of compatibility, p 4.

8 Statement of compatibility, p 4.

9 Statement of compatibility, p 2.

10 See, for example, *Gueye v. France*, Communication No. 196/1985, CCPR/C/35/D/196/1985 (3 April 1989), para 9.5; and *Olsson v Sweden*, European Court of Human Rights, Application No. 10465/83 (24 March 1988), para 82.

Act and Regulations. There has been no information provided to indicate how this power has previously been exercised when these information-sharing powers were not available.

2.110 The committee also notes that even if it can be demonstrated that the disclosure powers are considered necessary and seek to achieve a legitimate objective, it must also be demonstrated that the information-sharing and data retention is proportionate to that objective.

2.111 In this regard, the committee notes that the Minister may authorise the disclosure of information if he reasonably believes such disclosure is 'necessary or appropriate for the performance of functions or the exercise of powers' under the Migration Act (emphasis added). The committee notes that the standard of 'appropriateness' would appear to be a lower standard than the requirement under international human rights law that restrictions on rights be 'necessary'. The committee also notes that the Privacy Commissioner had 'advised that the authorised use and disclosure of personal information is clearly limited to that *necessary* to achieve the policy objective of the proposal'.<sup>11</sup>

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

- **The basis upon which information about whether a visa holder had been charged with or convicted of an offence had previously been shared with the Department and why this approach was considered deficient, necessitating the introduction of measures which permit the sharing of all BVE holders' information.**
- **The number of BVE holders who have been charged or convicted, for example, the rate per 1000 BVE holders.**
- **Information about the types of safeguards that have been provided or will be provided via the Memoranda of Understanding for using, storing and disclosing the information, including whether the police authorities may disclose the information to the public or other authorities and the duration of time that the information may be retained.**
- **How the standard of 'appropriateness' is consistent with the human rights requirement of demonstrating that a limitation on a right must be 'necessary'.**

*Right to non-discrimination*

2.113 Article 26 of the ICCPR recognises the right to non-discrimination and equal protection of the law. It prohibits discrimination in law or in practice. The grounds of

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11 Statement of compatibility, p 4.

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'. 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.

2.114 The committee considers that the amendments may give rise to issues of compatibility with the right to equality and non-discrimination as the disclosure powers pertain to information about BVE holders only and not to other visa classes.

2.115 The statement of compatibility suggests that restricting the powers in this way demonstrates that the powers are proportionate. However, it does not explain the basis for the differential treatment or whether these differences are based on reasonable and objective criteria. For example, it is not clear whether the government considers that the BVE cohort poses a higher public safety threat than other visa cohorts and, if so, the basis for such a view.

2.116 The statement also suggests that there is a heightened expectation that the Minister and department act in a timely manner in relation to any risks posed by a BVE holder because:

the person has been granted a BVE by the Minister using his personal powers, and in such cases, the grant of a BVE is a privilege and not an entitlement, as the BVE holder has not met the eligibility criteria that would otherwise be required by the migration legislation.

2.117 The committee observes that Australia's human rights obligations require the government to ensure that individuals are not detained arbitrarily. To that end, releasing people on bridging visas while they await the determination of their protection claims 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.

**2.118 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether these amendments are consistent with the right to equality and non-discrimination.**

