# Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013

*FRLI: F2013L01218*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 12 November 2013*
*PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013*
*Response dated: 20 January 2014*

# Migration Amendment (Disclosure of Information) Regulation 2013

*FRLI: F2013L02101*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

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

*FRLI: F2013L02102*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

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

*FRLI: F2013L02105*
*Portfolio: Immigration and Border Protection*
*Tabled: House of Representatives and Senate, 11 February 2014*
*PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014*
*Response dated: 28 February 2014*

**Background**

3.70 These four instruments introduced modifications to the Bridging E (Class WE) visa (BVE) scheme, principally in the context of its application to asylum seekers who are unauthorised maritime arrivals.

3.71 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. Since November 2011,

over 20,000 asylum seekers who arrived by boat have been released from immigration detention on BVEs pending determination of their protection claims.

3.72 The BVE cohort may also include unauthorised maritime and air arrivals who 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 means that all unauthorised arrivals are ineligible for grant of a permanent protection visa and such persons may continue to remain on BVEs, even after being found to be refugees or to otherwise engage Australia's protection obligations.

3.73 These four instruments made the following changes to the BVE scheme:

- The **Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013** introduced enhanced powers to cancel a BVE under a broad range of circumstances, including if a person has been charged or convicted of any offence in Australia or elsewhere, irrespective of the seriousness of the offence and whether the person poses a threat to public safety.
- The **Migration Amendment (Disclosure of Information) Regulation 2013** introduced enhanced information-sharing powers to enable the disclosure of personal information about BVE holders to the Australian Federal Police (AFP) or the police force of any Australian state or territory for the purposes of supporting existing powers to cancel a BVE.
- The **Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013** and the **Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155** introduced a mandatory code of behaviour as an additional visa condition for certain BVE holders. A person who breaches the code may be returned to immigration detention, transferred to Nauru or Manus Island, or have their income support reduced or terminated.

## Information sought by the committee

3.74 The committee considered these instruments in its First and Second Reports of the 44th Parliament and sought further information from the Minister for Immigration and Border Protection on a range of matters, which are discussed in the committee's comments below.

3.75 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extracts from the Minister's response are attached.

## Committee's response

3.76 The committee has considered the Minister's response in relation to each of these four instruments together, given their interrelated nature.

## *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013*

3.77 The committee thanks the Minister for his response.[1]

*Consequences of cancellation*

3.78 A person who has their BVE cancelled will be re-detained and become liable for removal from Australia or transfer to a regional processing country. The committee sought information whether cancelling a BVE under these provisions would in any circumstance be in and of itself grounds for the removal of the person as an unlawful non-citizen or for transferring the person offshore. The Minister's response explains that:

> The cancellation and re-detention of a BVE holder may lead to the person being removed from Australia to their home country or transferred offshore where the department is satisfied that no non-refoulement obligations exist in respect of the individual. The decisions to cancel or refuse a person's visa in itself will not create grounds for removal.[2]

**3.79 The committee thanks the Minister for this clarification and notes that it would have been helpful for this information to have been included in the statement of compatibility.**

3.80 The committee also sought clarification about the circumstances when a court could suspend the removal of a person, including whether such powers extended to a decision to transfer a person to a regional processing country. The Minister's response states that:

> The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. Courts can issue injunctions in order to preserve the status quo pending the final resolution of litigation or as final relief, following the determination of the substantive issues before the court.[3]

3.81 The committee thanks the Minister for his response but notes that the response does not provide the information sought by the committee.

**3.82 The committee intends to write to the Minister for Immigration and Border Protection to again seek clarification on the circumstances in which a court may issue an injunction to prevent a person's removal or their transfer to a regional**

---

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 4-7.

2 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 4.

3 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

**processing country. In particular, the committee seeks an explanation as to how and when a person may seek an injunction before the courts, and the grounds on which the courts may grant an injunction.**

*Scope of cancellation powers*

3.83 The committee had expressed concern that the amendments would enable a BVE to be cancelled under an extremely broad range of circumstances. Of particular concern to the committee was the low threshold which was set for triggering the exercise of these powers. Notably, a BVE could be cancelled on the basis that a person has been charged with or convicted of *any* offence, whether committed in Australia or elsewhere, irrespective of its seriousness and whether the person poses a threat to public safety. The committee recommended that the cancellation powers should be amended to provide a requirement for the relevant decision-maker to be satisfied that (i) the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and (ii) the exercise of the power is no more restrictive than is required in the circumstances.

3.84 In his response, the Minister declined to accept the committee's recommendation, stating that:

> Legislation alone cannot guarantee compliance with Australia's human rights obligations. Compliance with Australia's international obligations is broader than the content of the Act - it also extends to what Australia does *in toto* by way of legislation, administration and practice.[4]

3.85 In essence, the Minister's response argues that any legislative amendments are unnecessary because (i) 'although the legislation provides a trigger for considering cancellation of the [BVE], the decision to cancel … remains discretionary';[5] (ii) 'under policy, the decision-maker may take account of a range of factors when exercising the discretion to cancel;[6] and (iii) the BVE holder 'will be invited to show the grounds for cancellation do not exist or there is a reason why the visa should not be cancelled'.[7]

**3.86 The committee notes that these arguments have been raised as a matter of routine in relation to many of the legislative proposals considered by the committee that arise from the migration portfolio. The committee has emphasised**

---

4 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

5 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

6 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

7 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

**on multiple occasions, including in relation to migration amendments, that limitations on rights must not only be reasonable, necessary and proportionate to a legitimate objective, but that they must be prescribed by law, that is, they must have a clear legal basis, including being publicly accessible and not open-ended. The committee notes again that interferences with fundamental rights which are based solely on administrative discretion are likely to be impermissible under human rights law.**

**3.87 The committee reiterates that its mandate to assess the compatibility of legislation with Australia's human rights obligations necessarily encompasses a requirement to evaluate whether the legislation is sufficiently confined to ensure that human rights *will* be adequately respected in practice, and not simply whether the legislation *could* be applied consistently with human rights. The committee remains of the view that the amendments as drafted are not suitably circumscribed to provide sufficient protection against a person being arbitrarily detained, contrary to article 9 of the International Covenant on Civil and Political Rights.**

**3.88 The committee also intends to write to the Minister for Immigration and Border Protection to request clarification with regard to the following statement in his response: 'As a general rule, a visa should not be cancelled where the breach of [of a visa] condition occurred in circumstances beyond the visa holder's control'.[8] This would appear to give the decision-maker the discretion to cancel the BVE irrespective of how the breach occurred. The committee considers that it should be a requirement for the decision-maker not to cancel a BVE where the person is not at fault for the breach.**

*Exclusion of merits review*

3.89 The committee had expressed concern at the absence of merits review for BVE cancellation decisions which are subject to a conclusive certificate by the Minister. The Minister may issue a conclusive certificate under section 399 of the *Migration Act 1958* if he believes it would be contrary to the 'national interest' to change a decision or for the decision to be reviewed. The committee sought information from the Minister whether the exclusion of merits review in these circumstances was consistent with the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and the prohibition against arbitrary detention in article 9 of the ICCPR. The committee noted that BVE cancellation decisions would be subject to judicial review but that such review would only be compatible with article 9 of the ICCPR if it if it included the power to release a person from detention if the detention cannot be objectively justified.

3.90 In his response, the Minister notes that the courts have accepted that the term 'national interest' is 'a broad expression and that the question of what is or is

8 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

not in the national interest is an evaluative one entrusted to me as Minister for Immigration and Border Protection'.[9] The response nevertheless maintains that the availability of judicial review for BVE cancellation decisions is adequate:

> Issuing a conclusive certificate would not prevent the person concerned from challenging a visa cancellation decision through judicial review. The decision to cancel a visa may be reviewed on a number of grounds at law, including a lack of natural justice, whether the wrong legal test was applied or whether the decision maker acted in an illogical or unreasonable manner. The availability of judicial review, even where merits review is not available, satisfies the requirements of article 14 to the extent that article may apply to proceedings relating to visa decisions. A decision to issue conclusive certificates is also subject to judicial review.[10]

3.91 In relation to the committee's concern that the courts can only review detention on the basis of lawfulness, rather than on the basis of whether or not the detention is arbitrary, the response simply states that:

> This has always been the case and does not result from any new limitation on the courts introduced by these amendments.[11]

**3.92 The committee accepts that, generally, the availability of judicial review for visa cancellation decisions would be sufficient to satisfy the requirements of the right to a fair hearing in article 14(1) of the ICCPR.**

**3.93 In circumstances where a cancellation decision results in the re-detention of the person, however, the relevant issue is whether the availability of judicial review only is consistent with the prohibition against arbitrary detention in article 9 of the ICCPR. The Minister's response acknowledges that judicial review in these circumstances would not be able to test whether the decision to re-detain the person is objectively justified. The committee notes that the ability of an independent judicial review body to assess whether the detention is substantively arbitrary, not merely whether it is in accordance with law is a minimum requirement for compliance with the prohibition against arbitrary detention in article 9 of the ICCPR. The Minister's argument that 'this has always been the case' vis-à-vis the limited reach of judicial review in the Australian context is not an adequate response. Noting (i) the broad range of circumstances in which a BVE may be cancelled; (ii) the low threshold for triggering the exercise of the cancellation powers; and (iii) the broad meaning which is given to the term**

---

9 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

10 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 6.

11 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 6-7.

**'national interest' for the purposes of issuing conclusive certificates, the committee is not satisfied that the Minister has provided relevant and sufficient reasons to demonstrate that the exclusion of merits review for BVE cancellation decisions that are subject to a conclusive certificate is consistent with article 9 of the ICCPR.**

## *Migration Amendment (Disclosure of Information) Regulation 2013*

3.94 The committee thanks the Minister for his response.[12]

### *Memoranda of Understanding*

3.95 The committee had noted that that many of the key safeguards and procedures for implementing these new disclosure powers are to be contained in the relevant Memoranda of Understanding currently being negotiated with the Federal, State and Territory police.

**3.96 The committee remains of the view that it is difficult to assess whether the powers are compatible with human rights in the absence of further information about the specific content of these memoranda. The committee is therefore grateful to the Minister for undertaking to keep the committee apprised of progress towards finalising the Memoranda of Understanding. The Minister's response, however, did not confirm whether the final documents would be provided to the committee, as requested. The committee intends to write to the Minister to seek confirmation that copies of the final agreements will be provided to the committee for its information and assessment.**

**3.97 The committee thanks the Minister for confirming that the Privacy Commissioner was satisfied that the amendments as drafted are consistent with his recommendations and that his recommendations with regard to the drafting of the Memoranda of Understanding are being considered.**

### *'Necessary and appropriate'*

3.98 The committee notes the Minister's explanation that the standard of 'necessary and appropriate' for the exercise of the disclosure powers is consistent with the requirements of the *Privacy Act 1988* and his view that 'adhering to Australia's international obligations is broader than the content of the [Migration] Act – it also extends to what Australia does *in toto* by way of legislation, administration and practice'.[13] The response considers that the disclosure powers are consistent with the right to privacy in article 17 of the ICCPR because:[14]

---

12 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 23-27.

13 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 25.

14 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 25.

- 'the amendments, by requiring [the Minister] to consider whether disclosure is necessary or appropriate, are proportionate in their limitation on the right to privacy';
- the amendments are 'limited in relation to who is subject to the provisions and in relation to the type of information which can be disclosed'; and
- 'restrictions on the storage, use and further disclosure of information provided to police will be included in memoranda of understanding'.

**3.99 The committee notes the Minister's explanations but remains concerned that the standard of 'appropriate' would not appear to be fully consistent with the requirement under international human rights law that restrictions on rights be 'necessary'.**

**3.100 The committee notes that no information authorised by these amendments has been disclosed to the relevant police forces to date. Given that many of the key safeguards are to be contained in the Memoranda of Understanding, the committee intends to write to the Minister to seek clarification whether the disclosure powers authorised by these amendments are intended to be used prior to the relevant memoranda being finalised.**

*Right to non-discrimination*

3.101 The committee considered 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 visas classes. It was not clear, for example, whether the government considered that the BVE cohort carries a higher public safety threat than other visa cohorts.

3.102 In his response, the Minister basically reiterates the claim in the statement of compatibility 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.

**3.103 As the committee has previously noted, the committee does not consider the argument that a BVE is 'a privilege and not an entitlement' is a satisfactory justification for the differential treatment between BVE holders and other visa holders. Releasing individuals whose continued detention cannot be objectively justified is a necessary requirement for compliance with Australia's obligations under article 9 of the ICCPR, relating to the prohibition against arbitrary detention.**

**3.104 The committee, however, accepts the Minister's explanation that the amendments are necessary to overcome inconsistent arrangements across the different jurisdictions and are intended to implement a uniform national process. In this regard, the committee notes that the department currently only becomes**

**aware of information about BVE holders who have been charged or convicted of an offence on an *ad hoc* basis. The committee considers that, subject to the provision of appropriate safeguards for the use, disclosure and storage of the information disclosed, the amendments do not appear to be inconsistent with the right to equality and non-discrimination.**

## *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155*

3.105 The committee noted that the introduction of a mandatory code of behaviour for BVE holders risked authorising serious breaches of human rights and sought further information to ascertain whether the amendments were aimed at achieving a legitimate objective, and were reasonable, necessary and proportionate to that objective.

3.106 The committee thanks the Minister for his response.[15]

### *Statement of compatibility*

3.107 The committee noted that the instrument specifying the wording of the code itself is not subject to disallowance but that it would be good practice for all legislative instruments, particularly where they limit human rights, 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*.

3.108 The Minister's response 'notes that committee's suggestion',[16] and states that:

> The government will continue to abide by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which outlines when statements of compatibility are required to be prepared under the Act in relation to certain legislative instruments.[17]

**3.109 The committee observes that the Minister is taking a literal approach to the statement of compatibility requirement. The committee notes that the statement of compatibility requirement was introduced by the *Human Rights (Parliamentary Scrutiny) Act 2011* (HR(PS) Act) to, among other things, assist the committee and the Parliament generally to understand the government's rationale for considering whether any limitations of human rights in legislation are justifiable. Statements of compatibility are also an important indication of whether human rights have been**

15 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 28-35.

16 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 29.

17 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 29.

**adequately taken into account in the legislative process. If the government maintains that its reforms in the migration portfolio are consistent with its human rights obligations and has articulated its intention to fulfil those obligations, the committee considers that, as a matter of best practice consistent with the spirit of the HR(PS) Act, the government should provide its justifications for considering that the proposed legislation is compatible with human rights, regardless of whether a statement of compatibility is strictly required. This is particularly the case where legislation may involve limitations on rights.**

*Legitimate objective*

3.110 The committee asked whether the amendments were aimed at a public safety objective or if their primary purpose was to ensure that BVE holders comply with 'community expectations'.

3.111 The Minister's response states that:

> In order to effectively protect the Australian community and to maintain integrity and public confidence, the Government has introduced measures that provide the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour, encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. I am of the view that it is reasonable to hold a non-citizen to a higher standard of behaviour, where I have temporarily released them from detention on a BVE that I have granted in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Migration Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.[18]

3.112 The response states that prior to the introduction of the behaviour code on 14 December 2013, there was limited ability to cancel a BVE for behaviour that did not amount to a criminal charge or conviction:

> Under the previously existing Australian migration regulations there was scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence. However, this did not adequately capture repeated anti-social activities that did not attract a charge or conviction, but which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example, intimidation and threats against service provider staff members; or allegations of domestic violence where the victim does not wish the matter to be dealt with through criminal justice processes. … The code now addresses such

18 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 29-30.

> broader issues and focusses on public safety issues, such as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration.[19]

3.113 The response states that the behaviour code is also aimed at securing public health objectives:

> The code also seeks to ensure that health issues of BVE holders are appropriately managed and do not present a risk to the community. The code achieves this by requiring BVE holders who have signed it not to refuse to comply with any health undertaking provided by the department or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes. Health undertakings which require continued health treatment and/or to undertake further health assessments in the community are usually issued only for serious conditions such as tuberculosis.[20]

3.114 The committee asked for the basis on which the conclusion had been reached that BVE holders presented 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.

3.115 The Minister's response states that an average of two irregular maritime arrivals (IMAs) had been charged with criminal offences every week in the approximately three month period between the election in September 2013 and the introduction of the behaviour code in December 2013, including in relation to murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving.[21] The committee notes that this roughly translates to around 24 people (or approximately 0.1%) out of more than 20,000 IMAs on BVEs currently in the community.

3.116 The Minister's response also states that as at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained but does not explain the basis for these cancellations.[22] The response further states that 24 IMAs whose BVE had ceased have been re-detained following involvement in a criminal matter.[23] The response does not explain if these include the individuals who had been charged

---

19 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

20 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

21 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

22 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

23 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

with a criminal offence between September and December 2013, mentioned above. The response goes on to say that the number of BVE holders whose charges or convictions have resulted in visa cancellation under the new prescribed cancellation ground at regulation 2.43(1)(p) since 1 July 2013 (that is, in accordance with Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013, discussed above) is 56; of these two cancellations have been set aside by the Migration Review Tribunal (thus deemed never to have been cancelled).[24] It is not clear whether these numbers include the 50 IMAs who have had their BVEs cancelled as at 31 January 2014.

3.117 The committee notes that the statistics provided in the Minister's response do not give a clear account of the scope of the problem the government suggests BVE holders represent and which would necessitate the introduction of a mandatory code of behaviour for all BVE holders. The numbers provided appear to largely relate to situations where the BVE was cancelled as a consequence of the person engaging in criminal conduct. The committee notes that the powers to deal with such conduct already exist in migration legislation. The committee also notes that the number of BVE holders who engaged in criminal conduct in the three month period identified in the Minister's response would appear to comprise 24 people out of a BVE population of over 20,000 people. By comparison, the general rate of criminal offending in NSW in 2012 was over 2000 criminal incidents per 100,000 population, which is equivalent to 500 incidents per 100,000 population every three months or 100 per 20,000 population.[25] It would therefore appear that the rate of criminal offending in the wider community is substantially greater than the rate for BVE holders.

3.118 The committee also notes that the response appears to rely on anecdotal evidence to support the need for introducing enhanced cancellation powers to capture behaviour that falls short of criminal conduct. The response cites emerging issues relating to intimidation and threats against service provider staff members and allegations of domestic violence, but does not provide any evidence to support this assertion, including information as to the frequency of such incidents.

**3.119 The committee considers that the protection of public safety is a legitimate objective. The committee also accepts that conduct that does not attract a criminal charge or conviction may nevertheless still constitute a public safety issue. Similarly, the committee considers that measures which are aimed at public health objectives to be legitimate.**

---

24 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 30.

25 See Table A2, *Rate of criminal incidents recorded by NSW Police per 100 000 population by year and offence type*, available at: https://www.police.nsw.gov.au/about_us/crime_statistics/number_of_criminal_incidents_recorded_by_the_nsw_police_force_per_100,000_population_by_year_and_offence_type

**3.120 The committee, however, notes that the government must show that there are objective and reasonable grounds for adopting a specific behaviour regime applicable only to BVE holders and that any asserted factual basis for the differential treatment is supported by evidence.**

**3.121 While the committee accepts that the measures are primarily aimed at public safety objectives, the committee remains concerned that the necessity for these measures has not been adequately demonstrated.**

*Rational connection*

3.122 The Minister's response does not specifically address the question of whether and how the specific directives in the behaviour code (which range 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) are rationally connected to a legitimate objective.

**3.123 The committee, nevertheless, accepts that the code may provide the opportunity for early warning and preventative measures to be taken where necessary to protect public safety, provided that these are applied in a proportionate manner.**

*Proportionate response*

3.124 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 on individuals. The committee notes that the consequences of breaching the code are potentially severe. A person who breaches the code may be returned to immigration detention, including becoming liable to be transferred to a regional processing country, or have their income support reduced or terminated.

3.125 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.

3.126 The committee appreciates the additional explanations provided by the Minister but notes that the justifications put forward still rely primarily on (i) policy guidance, and (ii) the option not to exercise the powers as the basis for concluding that the measures are compatible with human rights.

3.127 The committee's key concerns as to the proportionality of these measures relate to the following aspects:

- The breadth of the cancellation powers, combined with the low threshold for exercising the powers;

- The option to reduce or terminate a person's income support as a method for sanctioning breaches of the code; and
- The absence of adequate oversight and monitoring mechanisms.

***Visa cancellation powers***

3.128 The behaviour code is an enforceable tool which provides a basis for cancelling a BVE. The statement of compatibility for these amendments acknowledged that the code captures 'a wide range of criminal offences or general conduct'. The committee is concerned that the general and open-ended nature of the directives, which cover a very wide range of behaviour, means the threshold for exercising these powers is set at a very low level. Any breach of the code could result in the BVE being cancelled, irrespective of its seriousness or whether the person poses a threat to public safety.

3.129 The Minister's response states that:

> Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remain discretionary, allowing the decision-maker to take account the merits of the case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given the particulars of those grounds and the information because of which the grounds appear to exist. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.[26]

3.130 The response argues that even though the cancellation process could be triggered by any breach of the code, there remain other options to deal with a breach:

> [W]hile the cancellation ground may be enlivened [by a breach of the code], there are a number of other sanctions that can be applied where a breach of the code has occurred, which can be tailored to suit individual circumstances and allow for flexible application. These sanctions include the use of counselling and warning letters for less serious breaches of the code, which are aimed at educating BVE holders further on the terms of the code and reinforcing behavioural expectations.[27]

3.131 The committee has already noted its concerns with regard to the broad powers for cancelling a BVE under the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.[28] The committee reiterates its view that

---

26 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 34.

27 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 34.

28 See comments above.

legislation must be sufficiently confined to ensure that human rights will be adequately protected in practice. As noted above, interferences with fundamental rights which are based solely on administrative discretion are likely to be impermissible under human rights law.

3.132 For these measures to be proportionate, the committee considers that the power to cancel a BVE holder's visa for breach of the code should only be possible when the decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
- that the exercise of the power is no more restrictive than is required in the circumstances.

**3.133 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.**

*Exclusion of merits review*

3.134 The committee notes that merits review of a decision to cancel a BVE for a breach of the code will not be available if the Minister issues a conclusive certificate, pursuant to section 399 of the Migration Act, stating that it would be contrary to the national interest to change a decision or for the decision to be reviewed. The committee has already noted its concerns about the exclusion of merits review for BVE cancellation decisions subject to a conclusive certificate in its comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.[29]

3.135 The Minister's response says that 'historically, this power has been exercised rarely'. The response does not explain whether and how the exercise of this power would be appropriate in the context of decisions to cancel a BVE for a breach of the code.

**3.136 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the types of situations envisaged and possible examples where it would be appropriate to issue a conclusive certificate for visa cancellation decisions relating to a breach of the code of behaviour.**

***Reduction or termination of income support***

3.137 A BVE holder receiving income support payments under the Asylum Seeker Assistance Scheme (ASAS) or the Community Assistance Support (CAS) programmes may have their income support reduced or terminated as a consequence of breaching the code.

3.138 The Minister's response states that:

29 See comments above.

> It is expected that temporary reduction or cessation of income support payments will be applied rarely. The decision to reduce or cease income support payments will be considered on a case by case basis, such as, where the IMA is not engaging in resolving their immigration status despite repeated contact from the department. Any reduction or cessation of income support payments will also take into consideration factors such as the family composition and the impact of the decision on the family as well as any flow on effects on the broader community and NGO sector. It is also expected that a BVE holder will be given opportunities to respond to alleged breaches of the code before any decision is made to temporarily reduce or cease payments.[30]

3.139 The committee notes that:

- Payment for income support under the CAS and ASAS is 89% of the equivalent Centrelink Special Benefit (which is comparable to 89% of Newstart Allowance).[31]
- Decisions to reduce or terminate income support payments are not subject to merits review.[32]
- BVE holders who arrived by boat after 13 August 2012 (that is, the majority of BVE holders) do not have permission to work.[33]

3.140 Our predecessor committee had noted that the absence of work rights combined with the provision of minimal support for asylum seekers on BVEs risks resulting in their destitution, contrary to the right to work and an adequate standard of living in article 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.[34]

3.141 In light of the already minimal support that is provided to BVE holders, the committee is concerned that any further reduction to their income support payments is likely to have a disproportionately severe impact on the person and their family. The committee is hard pressed to see how terminating a BVE holder's income

---

30 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

31 For example, a single adult receives an income support payment of$445.89 per fortnight, as opposed to a family of four with two children aged 4 and 16 which would receive an income support payment of $l,288.05 per fortnight. See: Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

32 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

33 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 32.

34 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013*, 19 June 2013, p 83.

support in these circumstances could ever be a reasonable option given that the person is also barred from working.

3.142 For these measures to be proportionate, the committee considers that:

- the power to sanction a BVE holder for breach of the code by reducing or terminating their income support must only be possible if the decision-maker is satisfied that such action will not result in the destitution of the person or their family; and
- decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.

**3.143 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.**

***Oversight and monitoring***

3.144 The committee considers that the implementation of the behaviour code has the potential to stigmatise BVE holders in the community. The provision of clear oversight and monitoring mechanisms is therefore critical.

3.145 The Minister's response states that:

> The department is alert to the need to mitigate against the potential abuse of the code by people with malicious intent such as disgruntled neighbours or estranged family members. As previously noted, any BVE holder whose visa is cancelled as a result of a breach of the code will be afforded procedural fairness similar to any cancellation process. The department has a strong relationship with service providers who are working with IMA BVE holder in the community. The department is advised of any adverse treatment of BVE holders as part of its regular communication with service providers. There is no evidence to suggest that the code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by the department and I would consider any appropriate action at that time.[35]

3.146 The committee accepts that the Immigration Department has strong relationships with service providers dealing with BVE holders in the community and this provides an important channel for relevant information to be passed to the department.

**3.147 The committee, however, notes that these processes appear to be *ad hoc* rather than a systematic approach to monitoring the impacts of the behaviour code on individuals in the community. The committee considers that there should be**

35 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 33.

**express monitoring mechanisms in place to assess the impact of these measures on BVE holders, including regular opportunities to consult with the affected individuals and other interested parties.**

**The Hon Scott Morrison MP**
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letter of 10 December 2013 in which further information was requested on the following legislative instruments:

- *Migration Act 1958 – Determination under subsection 262(2) – Daily Maintenance Amounts for Persons in Detention – October 2013* [F2013L01785];
- *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* [F2013L01218];
- *Migration Amendment (Temporary Protection Visas) Regulation 2013* [F2013L01811];
- *Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]; and
- *Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185].

My responses in respect of the above-named legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
20 / 1 /2014

As with immigration detention, the grant of a Bridging E (Subclass 050 and Subclass 051) Visa (BVE) is one option to manage the resolution of the immigration status of unlawful non-citizens and to provide for the appropriate protection of the community while that resolution of status is progressed. The BVE is a core tool used by departmental compliance officers to manage persons in the community who would otherwise be subject to immigration detention. The BVE is used for a broad range of persons and is not limited to asylum seekers.

Many BVE holders have become unlawful since arriving lawfully in Australia, and may include those unlawful non-citizens who have had:

- a visa cancelled after arrival or were not immigration cleared on arrival;
- a visa which ceased to be in effect; or
- a visa application refused and have become an unlawful non-citizen following that refusal.

Since November 2011, BVEs have also been granted to Illegal Maritime Arrivals (IMAs) in immigration detention. As IMAs are barred by the Act from making a valid application for a visa, if I wish to grant a BVE to an IMA I must use my personal, non-delegable powers under section 195A of the Act to grant a visa to a person in immigration detention where I think it is in the public interest to do so.

Where information becomes available to indicate that the BVE holder presents a risk to the Australian community, I (or a departmental decision-maker where I have delegated my power to them) may assess whether or not the discretionary cancellation powers under paragraphs 2.34(1)(p) or (q) should be used. These regulations detail a range of objective measures for determining whether a person may present a risk that may warrant visa cancellation and return to immigration detention. However, there is capacity for decision makers to take into account other considerations in deciding whether to exercise discretion to cancel a person's visa.

*Refoulement* concerns and Court power to suspend removal of a person, including transfer of a person to a regional processing country

I note that the Committee seeks clarification in relation to:

- whether the fact of cancelling of a BVE under these provisions, would in any circumstance be in and of itself a ground for removal of the person as an unlawful non-citizen or for transferring the person offshore; and
- the circumstances where a court can suspend the removal of a person, including whether such powers extend to a decision to transfer a person to a regional processing country.

The Australian Government takes its *non-refoulement* obligations seriously, and does not remove asylum seekers who have been found to engage Australia's protection obligations or who are still waiting for an assessment of their protection claims. There is no intention to change this practice or to breach the obligation of *non-refoulement* as articulated in the 1951 Refugees Convention and article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and as implied in articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR).

The cancellation and re-detention of a BVE holder may lead to the person being removed from Australia to their home country or transferred offshore where the department is satisfied that no *non-refoulement* obligations exist in respect of the individual. The decision to cancel or refuse a person's visa in itself will not create grounds for removal.

The Act establishes a framework of rules to regulate the entry and presence of non-citizens in

Australia. It also establishes obligations concerning the non-citizens' removal when their presence is no longer permitted in Australia by law. The removal power in section 198 of the Act imposes a duty on an officer of the department to remove an unlawful non-citizen as soon as reasonably practicable. This means that a person becomes liable for removal as soon as they become unlawful (that is, they no longer hold a valid visa to remain in Australia). The actual removal, however, will not take place until the person has had an opportunity to exhaust all available application and merits review entitlements.

All IMAs who arrive in Australia on or after 13 August 2012 are liable for transfer to a Regional Processing Country (RPC) for assessment of their protection claims. Similarly to section 198 of the Act, the obligation to transfer a person to an RPC under section 198AD of the Act only exists in relation to those IMAs who do not hold a valid visa. A person whose BVE has been cancelled will become liable for detention and transfer by operation of law rather than as a result of the cancellation. A decision to transfer a person will be subject to separate considerations (such as the person's individual circumstances, logistical issues and availability of space in the RPC).

Regional processing countries have provided the Commonwealth of Australia with assurances under Memoranda of Understanding that they will:

- not expel or return a Transferee to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership or a particular group or political opinion;
- make an assessment, or permit an assessment to be made, of whether or not a Transferee is covered by the definition of refugee in Article 1A of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees; and
- not send a Transferee to another country where there is a real risk that the Transferee will be subjected to torture, cruel, inhumane or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.

The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. Courts can issue injunctions in order to preserve the status quo pending the final resolution of litigation or as final relief, following the determination of the substantive issues before the court.

The tests for the grant of an injunction are well established in common law.

Redrafting of the amendments, access to merits review and arbitrary detention

I note that the Committee has recommended that the amendments are redrafted to provide a requirement that a BVE cancellation decision is predicated on a threat to public safety that is sufficiently serious. Legislation alone cannot guarantee compliance with Australia's human rights obligations. Compliance with Australia's international obligations is broader than the content of the Act – it also extends to what Australia does *in toto* by way of legislation, administration and practice.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that I notify a visa holder if there appear to be grounds for cancellation and give particulars of those grounds and the information because of which the grounds appear to exist. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled. Furthermore, under policy, the decision maker may consider a range of matters when exercising the discretion to cancel.

These include:

- The purpose of the visa holder's travel to and stay in Australia;
- If cancellation is being considered because of a breach of visa condition, the reason for, and extent of, the breach. As a general rule, a visa should not be cancelled where the breach of condition occurred in circumstances beyond the visa holder's control;
- The degree of hardship that may be caused to the visa holder and any family members;
- The circumstances in which the ground for cancellation arose (for example, whether extenuating or compassionate circumstances outweigh the grounds for cancelling the visa);
- The visa holder's past and present behaviour towards the department (that is, the officer takes into account any previous non-compliance, for instance, whether they have been truthful in statements or applications made to the department or have previously complied with visa conditions); and
- Whether Australia has obligations under relevant international legal instruments that would be breached as a result of the visa cancellation, such as:
    - If there are children in Australia whose interests could be affected by the cancellation;
    - Whether the cancellation would lead to removal in breach of Australia's *non-refoulement* obligations;
    - Other obligations arising from international legal instruments;
    - The impact of cancellation on any victims of family violence, where family violence is a factor; and
    - Any other relevant matters.

Before cancelling a visa under section 116 of the Act, the decision maker must, as a matter of law under section 119, notify the non-citizen of an intention to consider cancelling the visa. The visa holder will be invited to show the grounds for cancellation do not exist or there is a reason why the visa should not be cancelled. Under the Act, the visa holder must be given all relevant information before the discretion to cancel can be exercised.

I note further that the Committee seeks further information on whether the absence of a merits review for cancellation decisions which are subject to a conclusive certificate is compatible with the right to a fair hearing in article 14(1) of the ICCPR and the entitlement to bring proceedings before a court under article 9 of the ICCPR.

*The Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* does not include any provisions which restrict access to merits review of cancellation decisions. My power to issue conclusive certificates is contained in existing section 339 of the Act and is available in relation to decisions that would otherwise be 'MRT [Migration Review Tribunal]-reviewable' decisions under the Act.

Pursuant to section 339, I can issue a conclusive certificate if I believe it would be contrary to the national interest to change a decision or for the decision to be reviewed. The effect of issuing a conclusive certificate is that the decision is not reviewable by the MRT. The phrase 'national interest' is not defined for the purposes of section 339, but the courts have accepted that it is a broad expression and that the question of what is or is not in the national interest is an evaluative one entrusted to me as Minister for Immigration and Border Protection.

Issuing a conclusive certificate would not prevent the person concerned from challenging a visa cancellation decision through judicial review. The decision to cancel a visa may be reviewed on a number of grounds at law, including a lack of natural justice, whether the wrong legal test was applied or whether the decision maker acted in an illogical or unreasonable manner. The availability of judicial review, even where merits review is not available, satisfies the requirements of article 14 to the extent that article may apply to proceedings relating to visa decisions. A decision to issue conclusive certificates is also subject to judicial review. The Committee has expressed concern that the Courts can only review detention on the basis of lawfulness, rather than on the basis of whether or not the detention is arbitrary. This has always been the case and does not result from any new

limitation on the courts introduced by these amendments.

In light of the above, the Australian Government considers that *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* is not incompatible with the right to a fair hearing in article 14(1) of the ICCPR and entitlement to take proceedings before a court pursuant to article 9 of the ICCPR.

**The Hon Scott Morrison MP**
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letters of 11 February 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Amendment Bill 2013*;
- *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*;
- *Customs Amendment (Record Keeping Requirements and Other measures) Regulation 2013* [F2013L01968];
- *Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156* [F2013L02038];
- *Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101];
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* [F2013L02102];
- *Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155* [F2013L02105]; and
- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* [F2013L02104].

My responses in respect of the above-named bills and legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
25/3/2014

***Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101]**

The grant of a Bridging E (Subclass 050 and Subclass 051) Visa (BVE) is one option to manage the resolution of the immigration status of unlawful non-citizens. The BVE is a core tool used by departmental Compliance officers to manage persons in the community who would otherwise be subject to immigration detention. The BVE is used for a broad range of persons and is not only granted to asylum seekers.

Many BVE holders have become unlawful since arriving lawfully in Australia, and may include those unlawful non-citizens who:

- have had a visa cancelled after arrival or were not immigration cleared on arrival;
- have had a visa which ceased to be in effect; or
- whose visa application was refused and they became an unlawful non-citizen following that refusal.

Since November 2011, BVEs have also been granted to Illegal Maritime Arrivals (IMAs) in immigration detention. As IMAs are barred by the *Migration Act 1958* (the Act) from making a valid application for a visa, if I wish to grant a BVE to an IMA, I use my personal, non-delegable powers under section 195A of the Act to grant a visa to a person in immigration detention where I think it is in the public interest to do so.

Reasons for amendments

Where information becomes available to indicate that the BVE holder presents a risk to the Australian community, I (or a departmental delegate) may assess whether or not the discretionary cancellation powers under paragraphs 2.43(1)(p) or (q) should be used. These regulations detail a range of objective measures for determining whether a person may present a risk that may warrant visa cancellation and return to immigration detention. However, there is capacity for decision makers to take into account other considerations in deciding whether to exercise the discretion to cancel a person's visa.

Before I, or a delegate, can consider cancellation of a BVE under paragraphs 2.43(1)(p) or (q), I must have access to information about when the holder has been charged with or convicted of an offence. The *Migration Amendment (Disclosure of Information) Regulation 2013* (the amendments) support a framework of information sharing with Federal, State and Territory police which would assist police to provide timely advice when a BVE holder has been charged with or convicted of an offence.

Consultation with Privacy Commissioner

The Committee has sought clarification about whether the Privacy Commissioner was satisfied that the amendments as drafted are consistent with his recommendations. The Committee has also requested that I keep them 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.

In his response to the department dated 3 February 2014, the Privacy Commissioner stated that he was pleased to note that his comments on the amendment to the Migration Regulations relating to Bridging E Visa holders had been incorporated into that instrument. The Privacy Commissioner also acknowledged that his comments regarding the drafting of memoranda of understanding were being considered.

The department is continuing to engage with State and Territory police regarding the drafting of memoranda of understanding for information disclosure. The department will continue to keep the Parliamentary Joint Committee apprised of progress towards finalisation of the memoranda of understanding between the department and state/territory police.

Right to Privacy

The Committee has sought clarification about 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.

Formal and consistent arrangements across all eight police jurisdictions nationwide covering the disclosure of information do not presently exist. This has resulted in potential risks to the community due to the department being uninformed of criminal activity and as a result not reassessing a person's placement in the community. The engagement being undertaken by the department with state and territory police is intended to overcome these inconsistent processes with a standard national process that is underpinned by memoranda of understanding that clearly specify limitations on information disclosure, storage and disposal.

The Committee sought clarification about the number of BVE holders who have been charged or convicted of an offence. The department does not have this information, as currently it only becomes aware of information about BVE holders who have been charged or convicted of an offence on an *ad hoc* basis. The department can advise, however, that the number of BVE holders whose charges or convictions have resulted in visa cancellation under the new prescribed cancellation ground at regulation 2.43(1)(p) since 1 July 2013 (when this ground became available) is 56. Two of these cancellations have been set aside by the Migration Review Tribunal (thus deemed never to have been cancelled).

The Committee has sought 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.

The draft memoranda of understanding will have a number of clauses that will limit or prevent usage, storage or further disclosure of information provided to state or territory police. The department is undertaking consultation to ensure that memoranda of understanding terms are consistent with the *Privacy Act 1988* and State and Territory Privacy Legislation. The department has consulted the Privacy Commissioner in regards to the drafting of the memoranda of understanding and final copies of the agreements will be provided to the Privacy Commissioner for information.

The Committee has also queried how the standard of 'appropriateness' contained in paragraph 5.34F(3) is consistent with the human rights requirement of demonstrating that a limitation on a right must be 'necessary'.

Paragraph 5.34F(3) states that I, as Minister for Immigration and Border Protection, may authorise the disclosure of information only if I reasonably believe:

> *'the disclosure is necessary or appropriate for the performance of functions or the exercise of powers under the Act.'*

The phrase *'necessary or appropriate'* is consistent with the language adopted in section 504(1) of the Act, which states:

> *'the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are* ***necessary or convenient*** *to be prescribed for carrying out or giving effect to this Act* (emphasis added)*'*.

Adhering to Australia's international obligations is broader than the content of the Act – it also extends to what Australia does *in toto* by way of legislation, administration and practice.

The amendments, by requiring me to consider whether disclosure is necessary or appropriate, are proportionate in their limitation on the right to privacy. The amendments are also limited in relation to who is subject to the provisions (BVE holders) and in relation to the type of information which can be disclosed. As discussed above, restrictions on the storage, use and further disclosure of information provided to police will be included in memoranda of understanding.

The amendments are not in conflict with the Privacy Act as currently drafted. They are also consistent with changes to the Privacy Act made by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*, which come into effect on 12 March 2014. From that date the Department of Immigration and Border Protection will become an 'enforcement body' under the Privacy Act (the Australian Federal Police and police forces or services of a State or a

Territory are currently enforcement bodies). Under new Australian Privacy Principle 6.2(e) it will be permissible for an APP entity (defined to be an agency or organisation) to use and disclose personal information if the entity *'reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body'.*

Under the amended Privacy Act it will therefore be open to the department to disclose personal information about BVE holders to police, provided the department reasonably believes the disclosure is reasonably necessary, either for its own enforcement-related activities, or for the enforcement-related activities of the relevant police force or service.

The disclosure of information amendments, supported by the proposed memoranda of understanding with police, provide a framework for disclosure of information about BVE holders. This framework is being developed in consultation with the Privacy Commissioner and, as discussed above, will include a number of safeguards in relation to the storage, use and further disclosure of the information disclosed.

To date no information authorised by this regulation change has been disclosed by the department to the Australian Federal Police, or to State and Territory police forces or services.

Right to non-discrimination

The Committee has sought clarification about whether the amendments are consistent with the right to equality and non-discrimination.

The amendments will facilitate the release of information about BVE holders to police for the purpose of ensuring that the department is informed when BVE holders are charged with or convicted of an offence. The limitation on the right to privacy resulting from the amendments is therefore aimed at achieving a purpose which is legitimate. Before information can be disclosed pursuant to regulation 5.34F, I must decide that the disclosure is necessary and appropriate. Furthermore, the type of information to be disclosed is limited under paragraph 5.34F(3). The limitation on the right to privacy is, therefore, based on reasonable and objective criteria. The restrictions on disclosure under regulation 5.34F, and the further restrictions which will be included in the memoranda of understanding with police, ensure that the limitation on the right to privacy arising out of the amendment is proportionate to the aim to be achieved.

The Committee also queried why a limitation on privacy should be applied to BVE holders, which is not applied to holders of other visas. As discussed in the statement of compatibility with human rights, immigration detainees may be released on a BVE if they do not pose a risk to the Australian community. There is an expectation that BVE holders do not engage in criminal conduct of any kind while they reside in the community. In cases where it becomes obvious that the BVE holder does become a risk to the community, there is an expectation

that I and my department act in a timely manner. This expectation is especially heightened when the person has been granted a BVE by me using my personal powers. 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.

BVE holders should be subject to stricter scrutiny than other visa holders because of the nature of the cohort (persons who, if not for the visa grant, would be subject to immigration detention). BVE holders are, moreover, also subject to possible visa cancellation if charged with or convicted of an offence. In order to properly exercise my powers under the Act it is necessary that I receive information about BVE holders charged with or convicted of an offence. The amendments are part of an information sharing framework with Federal, state and territory police that would enable police to provide this information to the department. The information sharing arrangements will be further defined and limited by memoranda of understanding with police. My department is liaising with the Privacy Commissioner in relation to the formulation of these memoranda.

For the reasons discussed above, the amendments are consistent with the right to equality and non-discrimination.

***Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013*** **[F2013L02102]**

***Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155*** **[F2013L02105]**

The Bridging E visa (BVE) is a core tool used by departmental Compliance officers to manage persons in the community who would otherwise be subject to immigration detention. The BVE is used for a broad range of persons and is not limited to asylum seekers.

Many BVE holders have become unlawful since arriving lawfully in Australia, and may include those unlawful non-citizens who have had:

- a visa cancelled after arrival or were not immigration cleared on arrival;
- a visa which ceased to be in effect; or
- a visa application refused and become an unlawful non-citizen following that refusal.

Since November 2011, BVEs have also been granted to more than 20,000 Illegal Maritime Arrivals (IMAs) in immigration detention, significantly increasing the numbers of BVE holders in the community and resulting in IMAs comprising the majority of BVE holders in Australia.

IMAs are barred by the Migration Act 1958 (the Act) from making a valid application for a visa. If I wish to grant a BVE to a non-citizen in detention, including an IMA, I use my personal, non-delegable powers under section 195A of the Act to grant a visa to a person in immigration detention where I think it is in the public interest to do so.

The grant of a visa in these circumstances is not a right, and there is no right for such BVEs to be renewed when they expire. They are conferred on these non-citizens in the expectation that they will abide by the law, will respect the values that are important in Australian society, participate in resolving their status, and will not cause or threaten harm to individuals or groups in the Australian community. These considerations contribute to my judgement as to whether it is in the public interest to use my powers to allow these people to hold a BVE.

I consider it reasonable that non-citizens being released into the community on a BVE, particularly where the non-citizen has not lived in the Australian community previously, are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

Signing the code will ensure that non-citizens granted a BVE are aware of the behaviours that are expected of them while living in the community. The introduction of a mandatory behaviour code also provides the opportunity for early warning and preventative measures to be taken before more serious behavioural problems arise. In addition, the code provides a mechanism to ensure the protection of the Australian community through visa cancellation

and re-detention of a person who engages in certain types of behaviour generally not considered to be acceptable in the Australian community.

There are a range of other grounds under which a BVE holder could be considered for visa cancellation. For example, where a BVE holder is charged with, or convicted of a criminal offence, I (or a departmental delegate) may assess whether or not the discretionary cancellation powers under paragraphs 2.43(1)(p) should be used.

Good practice for all legislative instruments to be accompanied by a statement of compatibility

The government is aware that The Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 is exempt from the requirement to provide a statement of compatibility as it is not defined as a disallowable legislative instrument within the meaning of section 42 of the Legislative Instruments Act 2003. The government will continue to abide by section 9 of the Human Rights (Parliamentary Scrutiny) Act 2011, which outlines when statements of compatibility are required to be prepared under the Act in relation to certain legislative instruments. The government notes the Committee's suggestion at paragraph 2.62.

The objective of the code

I note that the Committee seeks clarification in relation to (2.72 & 2.76):

- 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 conclusion has been reached 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 I 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; and
- Whether and how the specific directives contained in the code of behaviour are rationally connected to achieving public safety.

In order to effectively protect the Australian community and to maintain integrity and public confidence, the Government has introduced measures that provide the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour, encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. I am of the view that it is

reasonable to hold a non-citizen to a higher standard of behaviour, where I have temporarily released them from detention on a BVE that I have granted in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Migration Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.

When I announced the implementation of the behaviour code on Friday 20 December 2013, I noted that an average of two IMAs had been charged with criminal offences every week since the election. Charges laid against IMAs at that time included murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving. As at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained, and 24 whose BVE had ceased have been re-detained following involvement in a criminal matter. The number of BVE holders whose charges or convictions have resulted in visa cancellation under the new prescribed cancellation ground at regulation 2.43(1)(p) since 1 July 2013 is 56. Two of these cancellations have been set aside by the Migration Review Tribunal (thus deemed never to have been cancelled).

Under the previously existing Australian migration regulations there was scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence. However, this did not adequately capture repeated anti-social activities that did not attract a charge or conviction, but which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example:

- Intimidation and threats against service provider staff members;
- Allegations of domestic violence where the victim does not wish the matter to be dealt with through criminal justice processes.

The code now addresses such broader issues and focusses on public safety issues, such as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration. The code also seeks to ensure that health issues of BVE holders are appropriately managed and do not present a risk to the community. The code achieves this by requiring BVE holders who have signed it not to refuse to comply with any health undertaking provided by the department or direction issued by the Chief Medical Officer (immigration) to undertake treatment for a health condition for public health purposes. Health undertakings which require continued health treatment and/or to undertake further health assessments in the community are usually issued only for serious conditions such as tuberculosis.

The department receives a range of information from a number of sources about people living in the Australian community on visas, including BVE holders. Whether this information relates to a breach of the code will be assessed on a case by case basis. Any BVE holder whose visa is cancelled as a result of a breach of the code of behaviour will be afforded procedural fairness similar to any cancellation process.

The introduction of a mandatory behaviour code is also intended to provide the opportunity for early warning and preventative measures to be taken in relation to less than criminal matters, before more serious behavioural problems arise.

Enforcement and Operation of the code

I note that the Committee seeks clarification on the following issues (2.88):

- 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 specific amount of income support currently provided to BVE holders and whether BVE holders have work rights, in order to assess the reasonableness of the option to reduce or stop a person's income support;
- 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.

My power to issue conclusive certificates is contained in section 339 of the Act and is available in relation to decisions that would otherwise be *'MRT* [Migration Review Tribunal]-*reviewable'* decisions under the Act. Historically, this power has been exercised rarely. Pursuant to section 339, I can issue a conclusive certificate in relation to a decision to cancel a BVE for breach of the code of behaviour if I believe it would be contrary to the national interest to change a decision or for the decision to be reviewed. The effect of issuing a conclusive certificate is that the decision is not reviewable by the MRT; however, judicial review of the decision would continue to be available. The phrase *'national interest'* is not defined for the purposes of section 339, but the courts have accepted that it is a broad

expression and that the question of what is or is not in the national interest is an evaluative one entrusted to me as Minister for Immigration and Border Protection. The regulation changes of 2013 have not changed these powers to issue a conclusive certificate for any decision reviewable by the MRT.

An IMA BVE holder receiving income support payments under the Asylum Seeker Assistance Scheme (ASAS) or the Community Assistance Support (CAS) programmes may have their income support reduced or ceased as a consequence of breaching the code. Assistance and support under these two policy programmes are not legislative entitlements or designed to provide welfare support to non-citizens. Rather this support is provided as a tool to overcome any barriers to the resolution of their immigration status.

It is expected that temporary reduction or cessation of income support payments will be applied rarely. The decision to reduce or cease income support payments will be considered on a case by case basis, such as, where the IMA is not engaging in resolving their immigration status despite repeated contact from the department. Any reduction or cessation of income support payments will also take into consideration factors such as the family composition and the impact of the decision on the family as well as any flow on effects on the broader community and NGO sector. It is also expected that a BVE holder will be given opportunities to respond to alleged breaches of the code before any decision is made to temporarily reduce or cease payments. The reduction or cessation of income support payments are not subject to merits review.

Payments for income support under the CAS and ASAS is 89 per cent of the equivalent Centrelink Special Benefit. For example, a single adult receives an income support payment of $445.89 per fortnight, as opposed to a family of four with two children aged 4 and 16 which would receive an income support payment of $1 288.05 per fortnight. While many BVE holders have permission to work, IMA BVE holders who arrived by boat after 13 August 2012 do not have permission to work.

I refer to the Committee's question in relation to whether consideration has been given to allowing a person to apply for a further BVE in certain circumstances. Under the Migration Amendment (Bridging Visas-Code of Behaviour) Regulation 2013, any person who has had a BVE cancelled for reason of failure to comply with condition 8564 or 8566, or where the visa was cancelled under a ground specified in 2.43(1)(p) or (q) is barred from applying for a further BVE. This regulation change was introduced to address the situation where a person whose visa was cancelled on the basis of a breach of the code, or due to being charged or convicted of a criminal offence (2.43(p)) could immediately apply for (and potentially be granted) a further BVE. This is because the BVE does not include criteria for grant that go to criminal activity or other misbehaviour. In cases where new information becomes available following a cancellation decision, I may consider using my powers under s195A of the Act to grant a further BVE to a person in immigration detention where I think it is in the public interest to do so. This mechanism allows for the grant of a BVE in certain circumstances, while preventing a person who has had their visa cancelled from immediately reapplying and being granted a further BVE.

My department will be responsible for enforcing the code. The department expects to receive information about potential breaches of the code through a range of sources, including service providers, police services, other government agencies and members of the public.

Relevant considerations with regard to any alleged breach will necessarily include an assessment as to whether the information is credible and/or reliable, and whether the allegation can be linked to an individual. Each alleged breach of the code will be assessed and sanctions will be considered on a case by case basis taking into account the individual circumstances of each case. The possible sanctions are not mutually exclusive and are not expected to apply in a pre-determined order. Possible sanctions include:

- Counselling;
- Warning letter
- Temporary reductions or cessation of income support
- Consideration of visa cancellation.

IMA BVE holders who are receiving support under the CAS and/or ASAS programmes are given orientation to Australian society by their service providers. The code will reinforce information provided during these orientation sessions. The educative aspect of the code is intended to assist people to understand the behaviour expected of them while they live lawfully in the community and to encourage cooperation of authorities while they are awaiting resolution of their visa status.

In relation to information-sharing, the department has initiated information disclosure arrangements with state and territory police for the purpose of ensuring the timely reconsideration of community placement for BVE holders and community detainees who are charged with criminal offences. A memorandum of understanding is being drafted to support information sharing between the department and State and Territory police. State and Territory police have been briefed on the code and the department may receive information from police relating to code concerns.

The department is alert to the need to mitigate against the potential abuse of the code by people with malicious intent such as disgruntled neighbours or estranged family members. As previously noted, any BVE holder whose visa is cancelled as a result of a breach of the code of behaviour will be afforded procedural fairness similar to any cancellation process. The department has a strong relationship with service providers who are working with IMA BVE holders in the community. The department is advised of any adverse treatment of BVE holders as part of its regular communication with service providers. There is no evidence to suggest that the code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by the department and I would consider any appropriate action at that time.

The requirements of legal certainty and restricting the right to freedom of expression

I note that the Committee seeks clarification on whether and how the code as currently drafted satisfies the requirements of legal certainty (2.94 & 2.95).

As stated previously, the code is both an enforceable tool providing a basis for visa cancellation and an educative tool for BVE holders to make behavioural expectations clear.

The department has put in place a number of processes to ensure that the code is clearly understood prior to the need to sign the code. For example, IMAs in held and community detention have been assisted by case managers and interpreters when signing the code to ensure that they understand the code and what it contains. Supporting information explaining some of the terms in the code is being translated into twelve community languages and people in the community can seek support from the department to sign the code where necessary. In addition an initial information session has been held for IMA BVE holders who receive Community Assistance Support services or Asylum Seeker Assistance Scheme services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given particulars of those grounds and the information because of which the grounds appear to exist. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.

In addition, while the cancellation ground may be enlivened, there are a number of other sanctions that can be applied where a breach of the code has occurred, which can be tailored to suit individual circumstances and allow for flexible application. These sanctions include the use of counselling and warning letters for less serious breaches of the code, which are aimed at educating BVE holders further on the terms of the code and reinforcing behavioural expectations.

I note that 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.

The code is not written in such a way as to regulate a BVE holder's ability to express certain views. It does, however, identify that certain types of behaviour could be viewed as harassment, intimidation or a form of bullying of other persons or groups of persons and are not considered to be tolerable in the Australian society, and therefore could be seen as a breach of the code. One of the important purposes of the code is to provide the opportunity for early warning and for preventative measures to be taken in relation to less than criminal matters, before more serious behavioural problems may arise. In that regard, I consider it

reasonable that BVE holders are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.