

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 21 and 24 November 2016 (consideration of three bills from this period has been deferred);¹
 - legislative instruments received between 4 and 10 November 2016 (consideration of two legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.³ Instruments raising human rights concerns are identified in this chapter.

1.3 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

1.4 The committee has also concluded its examination of the previously deferred Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2016 (No. 1) [F2016L01444] and Defence Regulation 2016 [F2016L01568] and makes no further comment on the instruments.

1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, '*Journals of the Senate*', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliament of Australia website, '*Journals of the Senate*', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Advice only

1.5 The committee draws the following legislative instrument to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 [F2016L01390]

Purpose	Amends various provisions in the Migration Regulations 1994 and the Australian Citizenship Regulations 2007 including in relation to imposing certain limitations on the approval of sponsors for prospective marriage and partner visas
Portfolio	Immigration and Border Protection
Authorising legislation	<i>Australian Citizenship Act 2007; Migration Act 1958</i>
Last day to disallow	24 November 2016
Rights	Protection of the family; family reunion; privacy; rights of children (see Appendix 2)

Background

1.6 The Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 (the regulation) contains seven schedules of amendments relating to the Migration Regulations 1994 (Migration Regulations) and the Australian Citizenship Regulations 2007, including in respect of applications for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK).

1.7 The *Migration Amendment (Family Violence and Other Measures) Act 2016* amended the *Migration Act 1958* (Migration Act) to require a proposed sponsor for a family visa to be assessed and approved as a sponsor before a visa application can be made.

1.8 In its *Report 7 of 2016*, the committee noted that, to assess the compatibility of the Migration Amendment (Family Violence and Other Measures) Bill 2016 with the right to protection of the family, it would be necessary to assess the criteria for a person to be approved as a family visa sponsor once this was prescribed by regulation.¹ This regulation prescribes the criteria for a person to be approved as a family visa sponsor.

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 93-94.

Approval of persons as family visa sponsors

1.9 Schedule 6 of the regulation amends the Migration Regulations to impose a limitation on the approval for sponsorship in respect of prospective marriage and partner visas.

1.10 New section 1.20KC of the Migration Regulations requires the Minister for Immigration and Border Protection to refuse the sponsorship of each applicant for a visa in circumstances where the sponsor has been convicted of a 'relevant offence or relevant offences',² and the sponsor has a significant criminal record in relation to this offence or offences.³ A 'significant criminal record' is defined at new section 1.20KD(1), and includes where a sponsor has been sentenced to two or more terms of imprisonment where the total is 12 months or more.

1.11 However, the minister has the discretion to approve the sponsorship where the minister considers it is reasonable.⁴ In considering whether it is reasonable to approve sponsorship, the minister is required to have regard to certain information, such as the best interests of any children of the sponsor and/or applicant, or the length of time since the sponsor completed the sentence(s) for the relevant offence(s).⁵

Compatibility of the measure with the right to protection of the family

1.12 The right to protection of the family includes ensuring that family members are not involuntarily separated from one another.⁶

1.13 The measure engages and limits this right insofar as, under certain circumstances where sponsorship of an applicant is refused by the minister pursuant to section 1.20KC(3), spouses can be separated from each other, and from their

2 'Relevant offence' is defined as involving (a) violence against a person, including (without limitation) murder, assault, sexual assault and the threat of violence; (b) the harassment, molestation, intimidation or stalking of a person; (c) the breach of an apprehended violence order, or a similar order, issued under a law of a state, a territory or a foreign country; (d) firearms or other dangerous weapons; (e) people smuggling; (f) human trafficking, slavery or slavery-like practices (including forced marriage), kidnapping or unlawful confinement; (g) attempting to commit an offence involving any of the matters mentioned in paragraphs (a) to (f), or paragraph (h); (h) aiding, abetting, counselling or procuring the commission of an offence involving any of the matters mentioned in paragraphs (a) to (g): new section 1.20KC(2).

3 Section 1.20KC(3).

4 Section 1.20KC(4).

5 See, section 1.20KC(4).

6 See articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights. In respect of children in particular, separation of a child from their parent is prohibited unless this is in the best interests of the child, as determined by competent authorities subject to judicial review; see article 9 of the Convention on the Rights of the Child.

children. That is, an individual may not be granted a visa to join their family member in Australia as that family member has not been approved as a sponsor.

1.14 Under international human rights law, the right to protection of the family may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to that objective and is proportionate to achieve that objective.

1.15 The statement of compatibility states that the amendments to the Migration Regulations provided for by Schedule 6 implements Action Item 11 of the Second Action Plan 2013-2016 of the National Plan to Reduce Violence against Women and their Children 2010-2020 (the Second Action Plan), which states:

...overseas spouses entering Australia will receive strengthened support by requiring additional information disclosure by the Australian husband or fiancé applying for an overseas spouse visa.⁷

1.16 The stated objective of the measure is to 'inform and protect potentially vulnerable people from harm'.⁸ This appears to be a legitimate objective from the perspective of international human rights law as it addresses a pressing and substantial concern.

1.17 The requirement under the regulation to be assessed and approved as a sponsor is limited to a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK). The statement of compatibility also provides the following explanation as to how the measures are likely to be effective in achieving the stated objective, demonstrating a rational connection to that objective:

These amendments build on the existing ability to request a police check be provided by sponsors of certain Child and Partner visa applicants, where there is a minor child in the application. These existing measures ensure that minor visa applicants seeking to enter or remain in Australia on certain Partner or Child visas are protected from being sponsored by people with convictions for child sex or other serious offences indicating they might pose a significant risk to a child in their care. These amendments recognise that some adult visa applicants can also be vulnerable.⁹

1.18 The statement of compatibility explains how the measure is proportionate to the stated objective:

- the relevant offences in section 1.20KC(2) are limited to certain crimes against the person and crimes relating to intimidation or harassment,¹⁰ and

7 Explanatory statement (ES), statement of compatibility (SOC) 10.

8 ES, SOC 13.

9 ES, SOC 12-13.

10 See footnote 2.

the sponsor is required to have a significant criminal record,¹¹ in respect of these specified crimes;¹²

- safeguards exist alongside the operation of the measure, including access to merits review by the Administrative Appeals Tribunal or judicial review by a court in relation to a final decision to refuse an application;¹³
- there is some flexibility in the application of the measure through the provision of discretion to the minister or delegate to approve sponsorship even where a sponsor has been convicted of an offence;¹⁴ and
- sponsors whose sentences or convictions have been quashed or nullified, or who have been pardoned, will not be detrimentally affected by this measure.¹⁵

1.19 On balance, the above elements of the scheme appear sufficient to ensure that the scheme is a proportionate limit on the right to protection of the family. In particular, the measure appears to be sufficiently circumscribed in relation to the criteria to be applied, safeguards exist in the form of access to administrative and judicial review, and the minister or delegate's discretion may provide a degree of flexibility in relation to the measure.

Committee comment

1.20 **The committee previously indicated that it would be necessary to consider the criteria for a person to be approved as a family visa sponsor, which have now been prescribed by this regulation.**

1.21 **Noting the preceding legal analysis, the committee considers that the process for approval as a family visa sponsor, set out in the regulation, is likely to be compatible with the right to protection of the family.**

Disclosure of information to visa applicants

1.22 Items 4 and 7 of Schedule 6 of the instrument insert sections 300.222(2) and 309.222(2) into Schedule 2 of the Migration Regulations. These new sections provide that the sponsor or prospective spouse consents to disclosure by the Department of Immigration and Border Protection (the department) to the visa applicant(s) of their

11 At subsection 1.20KD(1): in relation to a relevant offence or relevant offences if, for that offence or those offences: (a) the sponsor has been sentenced to death; or (b) the sponsor has been sentenced to imprisonment for life; or (c) the sponsor has been sentenced to a term of imprisonment of 12 months or more; or (d) the sponsor has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.

12 ES, SOC 13.

13 ES, SOC 14.

14 ES, SOC 13.

15 ES, SOC 12.

conviction for a 'relevant offence(s)'.¹⁶ Consent to this disclosure is a criterion of the visa grant.¹⁷

Compatibility of the measure with the right to privacy

1.23 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the use and sharing of such information.¹⁸

1.24 The measure engages and limits the right to privacy by providing for the disclosure of the personal information of the sponsor or prospective spouse by the department to the visa applicant (a spouse or family member). Under international human rights law, the right to privacy may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.25 It can be understood that the objective of this measure is, as above, to inform and protect potentially vulnerable people from harm.¹⁹ The statement of compatibility notes that the Second Action Plan specifically states that overseas spouses entering Australia will receive strengthened support owing to the requirement on their partner to disclose certain information when applying for a sponsor visa.²⁰

1.26 The statement of compatibility suggests that the disclosure of the sponsor's personal information by the department to the applicant is 'reasonable, proportionate and necessary', as it 'will ensure that visa applicants are aware of the sponsor's relevant history as it relates to instances of family violence, and any potential risk to their safety and the safety of their children.'²¹

1.27 The disclosure of information to visa applicants pursuant to this regulation is limited to visa applicants for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK). It can be accepted that the provision of information to these people regarding the type of offences covered by the measure is rationally connected to the objective of the measure.

1.28 The measure also provides that the conviction of the sponsor or prospective spouse is to be disregarded where the conviction has been quashed or otherwise nullified, or the sponsor or prospective spouse has been pardoned.²² Accordingly, the

16 ES 39. As set out above 'relevant offence' is defined to include a range of violent offences.

17 ES 39.

18 Article 17 of the International Covenant on Civil and Political Rights.

19 ES, SOC 13.

20 ES, SOC 11.

21 ES, SOC 14.

22 Schedule 6, Items 4 and 7, sections 300.222(3) and 309.222(3).

measure circumscribes which kind of information is to be provided (while excluding less relevant information).

1.29 The requirement to disclose a prior conviction appears to be sufficiently targeted to relevant information, while excluding irrelevant information, and therefore, it appears that the measure is likely to be a proportionate limitation on the right to privacy.

Committee comment

1.30 **Noting the preceding legal analysis, the committee considers that the regulation is likely to be compatible with the right to privacy.**

Bills not raising human rights concerns

1.31 Of the bills introduced into the Parliament between 21 and 24 November 2016, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Corporations Amendment (Crowd-sourced Funding) Bill 2016;
- Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016;
- Fair Work Amendment (Protecting Christmas) Bill 2016;
- Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016;
- Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016;
- High Speed Rail Planning Authority Bill 2016;
- National Health Amendment (Pharmaceutical Benefits) Bill 2016; and
- Renew Australia Bill 2016.