

EXPLANATORY STATEMENT

Select Legislative Instrument No. 32, 2014

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (2014 Measures No. 1) Regulation 2014

Subsection 504(1) of the *Migration Act 1958* (the Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the 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 the Act.

In addition, regulations may be made pursuant to the provisions of the Act listed in Attachment A.

The purpose of the *Migration Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation) is to amend the *Migration Regulations 1994* (the Principal Regulations) to strengthen and improve immigration policy.

In particular, the Regulation amends the Principal Regulations to:

- strengthen the integrity of the visa programme by amending Public Interest Criterion (PIC) 4020 to introduce requirements relating to a visa applicant's identity. In particular, the amendments will allow the Minister to refuse a visa application if the Minister is not satisfied as to the identity of the visa applicant, with the burden of proving an applicant's identity to be on the applicant. These amendments also provide that where a visa application is refused on this basis, there is a 10 year period where the applicant and any members of their family unit are unable to be granted any visa that requires an applicant to satisfy PIC 4020;
- ensure that an applicant for a Subclass 202 (Global Special Humanitarian) visa who is proposed by a minor who holds, or has held, a Subclass 866 (Protection) visa or a Resolution of Status (Class CD) visa, is assessed by the Minister against the same criteria as an applicant who is proposed by an adult who holds, or has held, such a visa. In other words, the applicant is assessed on:
 - the degree of discrimination to which the applicant is subject in the applicant's home country; and
 - the extent of the applicant's connection with Australia; and
 - whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from discrimination; and
 - the capacity of the Australian community to provide for the permanent settlement of the applicant in Australia.

- insert PIC 4020 into a number of visas to enable a decision-maker to refuse the grant of a visa where false or misleading information, such as fabricated evidence of visa eligibility or personal identifiers, is provided in association with a visa application;
- authorise the disclosure of information, specifically the name, the residential address, the sex, the date of birth and the immigration status, of persons covered by residence determinations to the Australian Federal Police or the police force or police service of a State or Territory. A residence determination is a determination that provides that a person is to reside at a specified place, instead of being detained. As such, persons covered by such determinations could be residing in the community as if they were being kept in immigration detention. It is intended that this disclosure will be authorised by the Minister about a person or whole classes of persons covered by residence determinations pursuant to subsection 197AB(1) of the Act. Relevantly, one of the conditions routinely specified in a residence determination is that the person covered by it must obey the law. If the person does not comply with that condition, the Minister may revoke the determination pursuant to subsection 197AD(1) of the Act. The purpose of the amendments is to assist in monitoring the individual's compliance with the residence determination conditions to give effect to the Minister's personal power to revoke residence determinations in the public interest; and
- ensure that the department's English proficiency threshold (presently in paragraph 457.223(4)(eb) and subparagraph 2.72(10)(g)(iv)) reflects industry requirements. Currently, the Principal Regulations provide that an applicant for, or holder of, a Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa) may, in order to be eligible for the grant of the visa, need to demonstrate a level of English proficiency (either vocational English, competent English, proficient English or superior English) as defined in either regulation 1.15B, 1.15C, 1.15D or 1.15EA, as well as achieve a specified score for the relevant test prescribed in a legislative instrument made by the Minister for the relevant regulation. The Regulation amends the Principal Regulations to omit the definitions of English proficiency from the Subclass 457 visa criteria and approval of nomination criteria under regulation 2.72. This enables the relevant English proficiency levels, including type of test and the scores that the applicant or holder must achieve, to only be specified in a legislative instrument made by the Minister.

A Statement of Compatibility with Human Rights (the Statement) has been completed, in accordance with *Human Rights (Parliamentary Scrutiny) Act 2011*, for each of the Schedules to the Regulation. The Statement's overall assessment is that the Regulation is compatible with human rights. A copy of the Statement is at [Attachment B](#).

Details of the Regulation are set out in [Attachment C](#).

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. The OBPR considers that the changes have a 'minor' impact on business or the not-for-profit sector and no further analysis (in the form of a Regulation Impact Statement) is required. The OBPR consultation references are as follows:

- 2013/16216;
- 2013/16152;
- 2013/16097;
- 2014/16368; and
- 16356.

In relation to the amendments made by Schedule 1, information about the changes relating to the new identity requirements under PIC 4020 was provided to the Migration Review Tribunal (MRT) via email, which is the routine means of communication between the department and the MRT. No comments/feedback from MRT members has been received at this time by the department.

The department provided information to migration agents about the new identity requirement under PIC 4020 via:

- direct emails to approximately 5,000 registered migration agents, which is a routine communications channel set up by the department to disseminate departmental updates and policy information to agents; and
- a link on the Agents Gateway to any information that is listed on the department's website.

A very small number of queries relating to operational aspects of the changes were received from migration agents, which were responded to by the department.

In relation to the amendments made by Schedule 2, the Government's views regarding persons who arrived in Australia illegally are well known and widely publicised. This change relates significantly to illegal maritime arrivals and is in line with current government policies and objectives. Minister Morrison recently consulted with a range of advocates and community leaders in Sydney, including the Hazara community, regarding the Humanitarian Programme. At that time, the Minister offered individual meetings on the Humanitarian Programme to advocates and community groups.

In relation to the amendments made by Schedule 3, the insertion of PIC 4020 into the four temporary visa subclasses is part of the staged rollout of an initiative of the department to enhance the integrity of Australia's migration programme. This process commenced in 2010 and PIC 4020 has been gradually extended to the majority of the department's visa programmes. A number of external stakeholders have been identified for the insertion of PIC 4020 into the identified visa subclasses, including the MRT, the Migration Institute of Australia, the Migration Alliance and the Law Council of Australia. These stakeholders have been notified that all applicants for the identified visa subclasses will soon be required to meet PIC 4020, in addition to all

existing visa requirements, and that this change will not negatively impact visa applicants and will improve the integrity of these visa programmes.

In relation to the amendments made by Schedule 4 and prior to the implementation of Regulation 5.34F, the department wrote to the Privacy Commissioner seeking his views, to which he responded outlining some concerns and recommendations. The department accepted the Privacy Commissioner's recommendations and provided subsequent advice regarding the amendments to include persons covered by residence determinations. The Privacy Commissioner responded to this correspondence acknowledging the amendments and reiterating his previous recommendations. Included in his recommendations, the Privacy Commissioner suggested that the Principal Regulation clearly describe:

- the kind of personal information that may be disclosed to the Police;
- that the information to be disclosed must only relate to individuals currently in community detention (i.e: persons covered by residence determinations); and
- the purpose for which the information may be disclosed and for which the information may be used or disclosed by the Police.

The department ensured that Regulation 5.34F and this statement address the concerns of the Privacy Commissioner. In addition, the department has consulted with the Police for the purpose of developing Memoranda of Understandings (MOUs) with each jurisdiction. These MOUs are to ensure consistent privacy practices and procedures are implemented by all recipients of information disclosed by the department under Regulation 5.34F. These MOUs are currently in draft stage and negotiations between the department and the Police are continuing. To ensure compliance with applicable privacy principles, this information sharing will not commence until these MOUs are in place.

In relation to the amendments made by Schedule 5, the department has consulted with applicants, employers (particularly small businesses) and the migration advice profession through their representations to the department.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on 22 March 2014.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the 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 the Act.

In addition, the following provisions may apply:

- subsection 31(1), which provides that there are to be prescribed classes of visas;
- subsection 31(3), which provides that the *Migration Regulations 1994* (the Principal Regulations) may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 and 38A);
- subsection 31(5), which provides that a visa is a visa of a particular class if the Act or the Principal Regulations specify that it is a visa of that class;
- subsection 40(1), which provides that the Principal Regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 41(1), which provides that the Principal Regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- subsection 41(3), which provides that, in addition to any conditions specified under subsection 41(1), the Minister may specify that a visa is subject to such conditions as are permitted by the Principal Regulations for the purposes of this subsection;
- subsection 45(1), which provides that, subject to the Act and the Principal Regulations, a non-citizen who wants a visa must apply for a visa of a particular class;
- subparagraph 65(1)(a)(ii), which relevantly provides that, after considering a valid application for a visa, the Minister, if satisfied that the other criteria for it prescribed by the Act or the Principal Regulations have been satisfied, is to grant the visa;
- paragraph 65(1)(b), which relevantly provides that, after considering a valid application for a visa, the Minister, if not so satisfied, is to refuse to grant the visa;

- subsection 140GB(1), which provides that an approved sponsor may nominate:
 - an applicant, or proposed applicant, for a visa of a prescribed kind (however described), in relation to:
 - the applicant or proposed applicant's proposed occupation; or
 - the program to be undertaken by the applicant or proposed applicant; or
 - the activity to be carried out by the applicant or proposed applicant; or
 - a proposed occupation, program or activity;
- subsection 140GB(2), which provides that the Minister must approve an approved sponsor's nomination if:
 - in a case to which section 140GBA applies, unless the sponsor is exempt under section 140GBB or 140GBC – the labour market testing condition under section 140GBA is satisfied; and
 - in any case – the prescribed criteria are satisfied;
- subsection 140GB(3), which provides that the Principal Regulations may establish a process for the Minister to approve an approved sponsor's nomination;
- subsection 140GB(4), which provides that different criteria and different processes may be prescribed for:
 - different kinds of visa (however described); and
 - different classes in relation to which a person may be approved as a sponsor;
- subsection 197AB(1), which provides that, if the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a residence determination) to the effect that one or more specified persons to whom the Subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1);
- subsection 197AB(2), which provides that a residence determination must:
 - specify the person or persons covered by the determination by name, not by description of a class of persons; and
 - specify the conditions to be complied with by the person or persons covered by the determination; and
- subsection 197AD(1), which provides that, if the Minister thinks that it is in the public interest to do so, the Minister may, at any time, revoke or vary a residence determination in any respect (subject to subsection (2)).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

- **Schedule 1 – Amendments relating to public interest criterion 4020**

Overview of the Legislative Instrument

The amendments to the *Migration Regulations 1994* (the Principal Regulations) in Schedule 1 of the *Migration Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation) seek to prevent identity fraud in Australia's visa and citizenship programmes, by expanding the application of Public Interest Criterion (PIC) 4020 so that a relevant visa could not be granted unless the Minister is satisfied as to the identity of the visa applicant.

The accurate identification of non-citizens underpins the integrity of Australia's migration and citizenship programmes. All elements of granting a visa rely on accuracy in identifying non-citizens. The utility of national security and character checks are wholly dependent on accurately identifying each non-citizen who applies for a visa to enter Australia.

Strengthening identity integrity is consistent with the Government's agenda to improve identity management. The new identity requirement will clearly communicate the primacy of accurately identifying non-citizens to the integrity of Australia's migration programme. As the 'gatekeeper' for border control, the department must ensure it accurately establishes the identity of non-citizens who cross Australia's border.

Current PIC 4020

PIC 4020 was introduced in 2011 to strengthen the integrity of Australia's immigration programme by detecting and preventing visa fraud. PIC 4020 provides a ground to refuse the grant of a visa where there is evidence that the visa applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal or an assessing authority or a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- the application for the visa; or
- a visa that the applicant held in the period of 12 months before the application was made.

PIC 4020 currently applies to over 80 onshore and offshore visas in the students, skilled, temporary and family caseloads. PIC 4020 does not currently apply to refugee, humanitarian or protection visa applicants. The amendments will not impact on the refugee, humanitarian and protection visa caseloads as these visas are not currently subject to PIC 4020.

Under current PIC 4020, two waivers provide for the discretionary grant of a visa despite the provision of a bogus document, or false or misleading information being provided to the department. These are:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

A three-year exclusion period is currently available under PIC 4020, where a visa is not to be granted to a person who has made a previous visa application where fraud has been detected. An exclusion period is imposed to:

- deter visa fraud - both general deterrence, by sending a clear message to all potential visa applicants that Australia does not tolerate fraud against its migration programme, and specific deterrence, to ensure an individual detected attempting to commit visa fraud is subject to a penalty; and
- prevent chain visa shopping, where a person ties up departmental resources making application after application as each prior application is refused.

An exclusion period for fraud is imposed by other like-minded countries, including Australia's Five Country Conference (FCC) partners, the United States of America, Canada and the United Kingdom. The United States of America imposes a life ban; the United Kingdom imposes a ban of ten years.

PIC 4020 is a 'one fails, all fails' criterion, whereby all applicants for a visa would not be granted a visa if a bogus document, or false or misleading information is provided to the department by any of the applicants.

Amendments to PIC 4020

These changes amend PIC 4020 to introduce a specific identity requirement into the grant of a visa. The features of the identity requirement are:

- a visa must not be granted unless the Minister is satisfied as to the identity of the person; and
- a decision to refuse to grant a visa where the Minister is not satisfied as to the identity of an applicant would not be subject to waiver; and
- a ten year exclusion period for the grant of another visa would apply where an applicant is refused a visa under PIC 4020 on identity grounds.

Because of the foundational element of identity to the integrity of Australia's migration programme, it is appropriate that the exclusion period is greater when a visa

is refused due to the person's identity is not established to a satisfactory level. A 10 year exclusion period better aligns with the policies of Australia's FCC partners. It will also reduce Australia's potential status as a country of 'last resort', where an individual may exhaust their options for migration to other FCC countries before applying to Australia. Further, an exclusion period of ten years reflects the Government's view of the primacy of accurately identifying non-citizens to the integrity of Australia's migration programme, and is intended to act as a deterrent.

The amendments to strengthen identity requirements in PIC 4020 are being sought because:

- identity fraud is considered by the Government to be of serious concern because it is the foundation for all checks, including national security and character checks, conducted by the department into the bona fides of individuals applying for a visa to enter Australia; and
- all entitlements or benefits (for example, a driver's licence and Medicare card) provided by both Commonwealth and State/Territory agencies, as well as by the private sector, to lawful non-citizens who have been granted a visa are dependent on the department accurately identifying each person before visa grant.

The new identity requirement is designed to encourage cooperation and compliance by visa applicants with the department to ensure accuracy in establishing their identity. The new identity requirement will also cater for an applicant who does not cooperate and provide information or documents where requested to assist the department to be satisfied as to their identity. This is because under the new identity requirement, the Minister must be satisfied as to the identity of an applicant to grant a visa. If insufficient information/documents are provided, or an applicant becomes uncooperative, the visa must be refused. The department would have discretion to consider a range of identity-related documents (not only a passport), as well as individual applicant circumstances (such as the availability of identity documents to the applicant) in determining whether it is 'satisfied' as to the identity of an applicant.

Human rights implications

The amendments in Schedule 1 have been considered against each of the seven core international human rights treaties. The following human rights are engaged by the amendments.

This amendment applies to persons who are both onshore and offshore at the time of application for a visa. Generally, Australia will only owe human rights obligations to persons within its territory and/or jurisdiction. As such, the analysis of the human rights implications of these amendments is relevant only to the extent that it applies to persons who seek to apply for a visa whilst onshore (i.e. in Australia at the time of visa application).

Respect for family – Articles 17(1) and 23 of the International Covenant on Civil and Political Rights

Under the International Covenant on Civil and Political Rights (ICCPR), Article 17 states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

Under the *Migration Act 1958* (the Act), all non-citizens must apply for and be granted permission to enter Australia. Australia's universal visa system ensures that entry into Australia of non-citizens is regulated, and that certain persons in appropriate circumstances are denied entry to Australia.

All security, health and character checks that are in place to regulate the entry of persons into Australia are based on accurately identifying each person who applies for a visa. The protection of the family unit under Articles 17 and 23 do not amount to a right to enter Australia where there is no other right to do so. The right to enter Australia is limited by security, health, character and, under the changes introduced under amended PIC 4020, entry into Australia will be limited by being satisfied as to the identity of an applicant.

Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of Australia's migration system and the national interest. The strengthening of the identity requirements under PIC 4020 for the grant of a visa seeks to improve the integrity of Australia's immigration programme by reducing identity fraud, and is expected to have positive flow-on benefits in the medium to longer term on the integrity of Australia's citizenship programme. Under the *Australian Citizenship Act 2007*, citizenship must not be granted unless the Minister is satisfied of the identity of the person. By applying the same level of confidence in a person's identity at the visa grant stage, as applies for Australian citizenship (i.e. to be satisfied as to the identity of the person), there should be fewer resources required to verify identity should a person remain in Australia and apply for Australian citizenship in the future.

In addition, ensuring the accurate identification of non-citizens who cross Australia's border has flow-on benefits in protecting the public revenue, and increasing the security of Australia's financial system, as the incidence of multiple identities for the same person will be reduced, thereby preventing the circumstances for identity fraud that may lead to obtaining benefits in Australia to which the person is not entitled (e.g. Centrelink benefits).

Best interests of the child – Article 3 of the ICCPR

Article 3 of the Convention on the Rights of the Child (CROC) requires that the best interests of the child are treated as a primary consideration in all actions concerning children. However, other considerations may also be primary considerations.

A foreseeable consequence of visa refusal under the amended PIC is that, upon the expiration of a current visa, an onshore applicant would become subject to immigration detention where another visa has been refused under PIC 4020. Where a child is part of the family unit of an adult who has been refused a visa on identity

grounds, there may be occasions where children, who are onshore, would be detained. All unlawful members of the family unit, including unlawful non-citizen children who are in the company of their parent/s, would be detained as a family unit pending removal from Australia. It would not be possible to split the family unit, whereby a child might be separated from other family members.

The best interests of the child, where as part of a family unit they have been refused a visa on identity grounds, do not amount to a right to remain in Australia. If one member of a family unit application is refused a visa on identity grounds, all members of the family will be refused, including any children on the application. Nor would the family be granted a visa for a period of ten years where the visa is refused on identity grounds. An exclusion period of ten years reflects the Government's view of the primacy of accurately identifying non-citizens to the integrity of Australia's migration programme, and is intended to act as a deterrent.

Prohibition on arbitrary detention – Article 9(1) of the ICCPR

Article 9(1) of the ICCPR states that:

Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Australia takes its obligations to people in detention very seriously. The Australian Government's position is that the detention of individuals requesting protection is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the ground/s for the detention are justifiable.

In the context of Article 9, 'arbitrary' means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

A foreseeable consequence of visa refusal under the amended PIC is that, upon the expiration of their current visa, an onshore applicant would become subject to immigration detention in accordance with subsection 189(1) of the Act. This could occur where a subsequent application made onshore to extend the stay in Australia is refused under PIC 4020. Non-citizens who do not hold a valid visa are unlawful non-citizens. The Act authorises the detention of unlawful non-citizens. The detention of unlawful non-citizens who do not hold a valid visa is an administrative action; it is not a custodial sentence. Detention would only be until the person leaves Australia, or is granted another visa to remain in Australia.

Mandatory detention is an essential component of strong border control, and is an essential element of supporting the integrity of Australia's migration programme.

Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.

In these circumstances, detention is a requirement under the Act because the person is unlawful as they do not hold a valid visa.

The new identity requirement under amended PIC 4020 is consistent with the Government's priority to:

- improve the integrity of Australia's migration programme through the accurate identification of non-citizens;
- ensure all mandatory security, health and character tests are met, and there is no avoidance through the use of a false identity; and
- reduce the impact of identity fraud on the Australian economy.

The Government's priorities are reasonable and proportionate measures to protect the interests of the Australian community, and are applied without discrimination to all non-citizens who seek to enter or remain in Australia.

Conclusion

Insofar as the amendments in Schedule 1 limit the above-mentioned human rights, those limitations are reasonable and proportionate to the objective they seek to achieve, being the prevention of entry and stay of persons who may pose a risk to the Australian community. As such, the amendments are compatible with human rights.

- **Schedule 2 – Amendments relating to Subclass 202 (Global Special Humanitarian) visas for applicants proposed by minors**

Overview of the Legislative Instrument

The Special Humanitarian Programme (SHP) is part of the offshore component of Australia's Humanitarian Programme. The SHP provides resettlement in Australia for people who:

- are living outside their home country,
- are subject to substantial discrimination amounting to a gross violation of their human rights in their home country, and
- have family or community ties to Australia.

It also provides resettlement for immediate family of persons who have been granted protection in Australia.

The policy settings under the SHP were changed in September 2012 as a result of the Expert Panel on Asylum Seekers recommendations implemented by the previous government.

Most SHP applicants must meet the 'compelling reasons' criterion at the time of their visa decision. Since September 2012, immediate family members of proposers who

arrived on a Humanitarian (Class XB) visa and those who were under 18 at the time they proposed their family, received a ‘concession’ against this criteria and instead were taken to have met the ‘compelling reasons’ criterion, based on their family connection alone.

All other applicants are required to meet the four ‘compelling reasons’ criterion which is set out in the SHP regulations at clause 202.222 (with similar clauses in the refugee subclasses):

The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:

- a) the degree of discrimination to which the applicant is subject in their home country; and*
- b) the extent of the applicant’s connection with Australia; and*
- c) whether or not there is any other suitable country that can provide for the applicant’s settlement and protection from discrimination; and*
- d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.*

The Principal Regulations are amended by this Schedule so that SHP applicants with proposers who were ‘Unaccompanied Humanitarian Minors’ (UHMs) who arrived before 13 August 2012 are assessed against the four compelling reasons criteria, listed above. This effectively removes the current concession in place for proposers who are minors, and instead places minors on the same footing as their adult counterparts who are assessed against the full four compelling reasons factors. The main difference will be that family of minors will need to show that they have humanitarian claims in their own right, which will make it more difficult to be eligible for an SHP visa.

Human rights implications

The amendments in Schedule 2 engage the following human rights:

Family Rights

Under the ICCPR, Article 17 relevantly states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23(1) states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The protection of the family unit under Articles 17 and 23 do not amount to a right to enter Australia where there is no other right to do so.

As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family. However, Australia considers that these amendments do not amount to a separation of the family as there has been no positive action on the part of Australia to

separate the family. A Protection visa holder becomes separated from their family when they choose to travel to Australia without their family.

To the extent that this amendment might amount to interference with the family, Australia maintains that for the above reason any interference is not arbitrary and is thus consistent with the rights contained under Articles 17 and 23 of the ICCPR.

Rights of the Child

Article 3 of the CROC requires that the best interests of the child are treated as a primary consideration in all actions concerning children. However, other considerations may also be primary considerations.

While it may be in the best interests of UHMs to be reunited with their family, the best interests of a child can be outweighed by other countervailing considerations such as the need to uphold the integrity of the Humanitarian Programme and its aim to help resettle people with the greatest humanitarian need, including women, children and other vulnerable persons, with an emphasis on those who are proposed by persons who arrived in Australia under the offshore Humanitarian Programme. More broadly, the change is consistent with overall Government policy to encourage migration to Australia through regular means, which allows family groups to migrate together.

Therefore, Australia considers that the amendments in Schedule 2 are consistent with Article 3 of the CROC.

Article 10 of the CROC relevantly requires that applications for family reunification made by minors or their parents are treated in a 'positive, humane and expeditious manner'. However, Article 10 does not amount to a right to family reunification in and of itself. As discussed above, removing the concession for UHMs merely places those proposers on equal footing as their adult counterparts who are assessed against the four compelling reasons factors, which will uphold the aims of the Humanitarian Programme. Further, for those UHMs who meet the eligibility criteria, there is the option of sponsoring their parents under the Parent visa programme.

As such, to the extent that the rights under Article 10 are limited by the amendments in Schedule 2, Australia considers that these limitations are necessary, reasonable and proportionate.

Conclusion

The amendments in Schedule 2 are compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

- **Schedule 3 – Amendments relating to inserting public interest criterion into various visa subclasses**

Overview of the Legislative Instrument

The amendments in Schedule 3 make amendments to the Schedule 2 of the Principal Regulations for a number of temporary entry visa subclasses to include PIC 4020. PIC 4020 will be included into the Principal Regulations for these visa subclasses:

- Subclass 416 (Special Program) visa;
- Subclass 417 (Working Holiday) visa;
- Subclass 462 (Work and Holiday) visa; and
- Subclass 488 (Superyacht Crew) visa.

The application of PIC 4020 to these temporary entry visas will provide the ability to refuse visas where it is found that false information has been provided by visa applicants. This will act to deter the provision of false or misleading information or falsified documents in visa applications, and provide an effective mechanism for dealing with applications that fall into this category.

Visa applicants who fail to satisfy PIC 4020 would not be eligible for a grant of a relevant Education or Tourism visa until three years have elapsed since the decision to refuse on the basis of PIC 4020 or a waiver has been exercised. The option to waive the three year ban following an applicant's failure to satisfy PIC 4020 operates in accordance with existing regulations (Part 4) for PIC 4020, which relate to compelling or compassionate circumstances that affect an Australian Citizen or Permanent Resident, or where it is in the national interest.

Due to the effect of new subclauses 4020(2A) and (2B), the applicant is also required to satisfy the Minister that they and each member of their family unit, have not been refused a visa because they failed to satisfy the Minister as to their identity under new subclause 4020(2A), where this refusal occurred within a period starting ten years before the visa application was made and ending when the Minister makes a decision to grant or refuse the application.

The addition of PIC 4020 to this range of visa subclasses will improve overall migration programme integrity.

The amendments in Schedule 3, which insert PIC 4020 into the visa subclasses noted above does not constitute a substantive change to existing requirements under Schedule 2 of the Principal Regulations for those visa subclasses.

Human rights implications

The amendments in Schedule 3 do not engage any of the applicable rights or freedoms.

Conclusion

The amendments in Schedule 3 are compatible with human rights as it does not raise any human rights issues.

- **Schedule 4 – Amendments relating to the release of information to the police**

Overview of the Legislative Instrument

The amendments in Schedule 4 amend regulation 5.34F of the Principal Regulations to authorise the disclosure of information relating to people covered by residence determinations (community detainees) to the Australian Federal Police or the police force or police service of an Australian State or Territory (the Police). The information to be disclosed is limited to the names, the addresses, the sex, the date of birth and the immigration status of community detainees.

Minor changes to the wording of sub-regulations 5.34F(1) and (2) of the Principal Regulations are made to provide that regulation 5.34F is to also apply to persons, or class of persons covered by residence determinations. Regulation 5.34F prescribes the circumstances in which information in relation to certain persons may be disclosed to the Police. Prior to this amendment, only information relating to persons holding a Subclass 050 (Bridging (General)) visa or Subclass 051 (Bridging (Protection Visa Applicant)) visa was permitted to be disclosed in accordance with the requirements of regulation 5.34F.

Expanding the scope of persons whose information may be disclosed pursuant to regulation 5.34F is for the purpose of supporting (or otherwise facilitating) compliance activities of the department. The Australian Government has become increasingly concerned about community detainees who engage in criminal conduct after being released into the community from an immigration detention facility.

The disclosure of information will help the Police to provide more than one piece of information to cross-check, ensuring positive identification. As such, cases that come to the attention of the Police can be referred to the department as soon as reasonably practicable. This will in turn support and facilitate the department's monitoring of compliance of community detainees with one of the key conditions of a residence determination.

Condition 6 –states in part that:

- the community detainee must abide by all Commonwealth, State or Territory laws that apply to the State or Territory they are living in;
- the community detainee must abide by any Council laws or by-laws that apply to area you are living in;
- the community detainee must behave in peaceful ways and try to resolve any conflicts in calm and respectful ways. Community detainees must not act violently or make threats of violence, towards any individual or group in

- Australia, including their family members, their case worker, or departmental staff; and
- the community detainee must not become involved in activities which threaten harm or are disruptive to the Australian community or a group within the Australian community.

A failure to comply may result in the revocation of the residence determination placement.

Additionally, the amendments assist in the continuation of a cooperative working environment between the department and the Police, enabling information sharing and collaborative work practices.

Human rights implications

The amendments in Schedule 4 have been assessed against the seven core international human rights treaties. It engages the following human rights.

Right to privacy

Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The extent to which an individual is entitled to a right to privacy in Australia is governed by the *Privacy Act 1988* (the Privacy Act). Section 14 of the Privacy Act contains the Information Privacy Principles which assist Government departments to ensure the lawful collection, solicitation, storage, record keeping, access, use and disclosure of personal information. From 24 March 2014, the Privacy Act amendments will come into effect, including the new Australian Privacy Principles. It is intended that the disclosure of information pursuant to this amendment will be in accordance with current and future requirements under the Privacy Act.

This amendment will expand upon the recent regulation change implemented on 14 December 2013 for Bridging E Visa (BVE) holders – Regulation 5.34F (the BVE amendment). Prior to implementation of the BVE amendment to, the department consulted the Federal Privacy Commissioner.

During this consultation the department foreshadowed the intention to make an additional change regarding the disclosure of information about community detainees to federal, state and territory police. The department has provided subsequent correspondence to the Privacy Commissioner outlining the specific details of this amendment, to which he acknowledged and re-iterated his previous advice.

The Privacy Commissioner also commented that where an amendment to the Principal Regulations require or authorises the department to disclose information to police, that this would be permitted under the current Information Privacy Principle 11.1 of the Privacy Act, and will also be permitted under the Australian Privacy Principles when they come into effect on 12 March 2014.

The Privacy Commissioner recommended that the BVE amendment be drafted narrowly to constrain the use and disclosure of the personal information consistent with the spirit and intent of the Privacy Act. He suggested that the BVE amendment clearly describe the kind of personal information disclosed, that the information is only disclosed about those specified in the Principal Regulations, and it specify the purpose for which the information is disclosed. He advised that the authorised use and disclosure of personal information is clearly limited to that necessary to achieve the policy objective of the proposal. Additionally, the Privacy Commissioner raised the risk of using 'identifiers' such as visa numbers and commented on their heightened privacy risks.

The department accepted the previous advice of the Privacy Commissioner on this issue and has narrowly drafted this amendment to clearly describe the information that may be disclosed. This information is specified as only the name, the residential the address, the sex, the date of birth and the immigration status. There are no 'identifiers' of the kind described as a risk by the Privacy Commissioner in the amended Regulations. Further, this amendment will only apply to those who are covered by a residence determination on or after the commencement date of the amendment.

In order to implement this amendment in accordance with the Privacy Act, the department intends to put in place formal arrangements through Memoranda of Understanding with federal, state and territory police services to cover the disclosure of the specific information and the Minister's expectations about how they will use it. Information sharing with police services ensures that information is maintained within a controlled and protected environment with access within the relevant organisations limited to those with a need to know. Standard compliance with information disclosure and storage requirements contained within Commonwealth, state and territory laws, along with applicable internal governance remain in effect. The Memoranda of Understanding will address privacy and security requirements and the need to limit further dissemination of information not authorised by law.

The Privacy Commissioner also provided feedback on the Memoranda of Understanding with the Federal, State and Territory police to support the operation of the BVE amendment. He noted that the Memoranda of Understanding provides an opportunity to ensure consistent privacy practices and procedures are implemented by all police services and police forces. In particular, the Memoranda of Understanding should specify that the information regarding BVE holders and community detainees is only used for the purposes outlined in the Principal Regulations, clear procedures are established to identify if a person charged with a criminal offence is covered by a residence determination, and that there are clear practices, procedures and systems to ensure the security of the information disclosed.

The department will take into account the recommendations the Privacy Commissioner has made when the Memoranda of Understanding relevant to this amendment are drafted with relevant police services and police forces. The intention is that these Memoranda of Understanding will set out the procedures to disclose and manage the information about BVE holders and community detainees, and with the policy objective of supporting the department's compliance operations.

The department has considered all previous feedback from the Privacy Commissioner in relation to the recent Migration Regulation change regarding BVE holders in the drafting of these amendments affecting persons in community detention. Additionally, the department welcomes further feedback from the Privacy Commissioner regarding this amendment.

The right to privacy as outlined in article 17 of the ICCPR further prohibits interference with privacy that is arbitrary. The use of the term arbitrary in the ICCPR mean that any interferences with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.

The objective of this amendment is to ensure the safety of the Australian community and to preserve those rights owed to Australian citizens pursuant to the ICCPR where such rights may be jeopardised by the conduct of a person in community detention. Therefore, the amendment is both reasonable and proportionate to the objective of protecting the safety of the Australian community. This will be achieved by allowing the disclosure of information to relevant federal, state and territory police services to support the department and the Minister which will in turn ensure all residence determinations (community detention placements) remain in the public interest. The amendment is intended to ensure that the police have access to limited information on all community detainees and are able to readily identify if a community detainee has been charged with a criminal offence. The provision this limited information will provide the police with more than one personal identifier to cross check, ensuring a positive identification. The amendment will facilitate information sharing between police services and the department, so that appropriate cases can be referred to the department for consideration of revocation of residence determination. Further, this amendment also authorises the disclosure of the information only if the Minister reasonably believes that the disclosure is necessary or appropriate for the performance and exercise of powers under the Act. Disclosing information to identify community detainees to police forces and police services supports an existing revocation power.

As recommended in the Privacy Commissioner's written response to the BVE amendment, careful consideration has been given to the 'proportionality' of the approach in terms of the potential risks to individuals should their personal information be compromised.

Any limitation on the community detainee's privacy as the result of this amendment is reasonable and lawful and required for federal, state and territory police services to assist and maintain public order. This limitation will support the department's monitoring of compliance by persons subject to a residence determination by allowing prompt consideration of revocation of the placement in the community in the event of

non-compliance with key conditions. As such, there is a clear rational connection between the objective of the amendments in Schedule 4 and the limitation of the right to privacy.

As such, the amendment is consistent with article 17 of the ICCPR.

Article 9(1) of the ICCPR - prohibition on arbitrary detention

As these amendments support the department's compliance activities, specifically by allowing prompt consideration of visa cancellation and, therefore the possible re-detention of the BVE holder, Article 9(1) of the ICCPR is engaged.

Article 9(1) of the ICCPR states that:

Every person has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Australia takes its obligations to people in immigration detention very seriously. The Australian Government's position is that the detention of individuals requesting protection is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

In the context of Article 9, detention that is not 'arbitrary' must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

A community detention placement may be revoked in a more timely manner as a result of the information sharing powers introduced by this amendment. This will necessarily result in the transfer of the individual in question to a more robust detention facility with more limitations than that experienced in the community detention environment.

As stated above, the objective of this proposal is to ensure the safety of the Australian community and to preserve those rights owed to Australian citizens pursuant to the ICCPR where such rights may be jeopardised by the conduct of a person in community detention. Therefore, the amendment is both reasonable and proportionate to the objective of protecting the safety of the Australian community.

Conclusion

The amendments in Schedule 4 are compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

- **Schedule 5 – Amendments relating to English language requirements for Subclass 457 visas**

Overview of the Legislative Instrument

The objective of this change is to amend regulation 2.72, clause 457.111 and subclause 457.223(4) of the Principal Regulations to remove references to ‘vocational English’, ‘competent English’, ‘proficient English’ and ‘superior English’ and create an instrument making power to enable the prescription of English language requirements for the Temporary Business Entry Migration Programme.

Specifying the English language requirements for applicants for, and holders of, a Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa) in an instrument will provide flexibility so that those requirements can be adjusted to better reflect industry requirements without the need for further regulation change. Exemptions to the English language requirement are currently specified in a legislative instrument. An additional class of exempt persons will be added to this instrument, namely applicants who hold a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland and are citizens of one of those countries. Previously, these applicants satisfied the vocational English requirement and were not required to be exempted.

Human rights implications

The amendment has been assessed against the seven core international human rights treaties. Generally, Australia owes human rights obligations only to those within its territory and/or jurisdiction. The Subclass 457 visa to which this amendment relates may be applied for both onshore (i.e. while the applicant is in Australia) or offshore (i.e. when the application is outside Australia). Therefore, the human rights implications of the amendment assessed below are relevant to the extent that they pertain to persons seeking to satisfy the criteria for the grant of a Subclass 457 visa while onshore.

As the measure deals with the extension of work rights to non-citizens, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is relevant. Article 6 provides:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

It is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated ‘work rights’ are attached to certain types of visas, including the Subclass 457 visa. A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

...only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.

The authority from the Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights (such as language requirements) are lawful as a matter of domestic law and have as their objective the continued access of Australian citizens and permanent residents to paid employment. As such, the proposed amendments are justified in accordance with Article 4 of ICESCR.

As the measure purports to discriminate in favour of the abovementioned passport holders, consideration has to be had to whether this engages Article 2.2 and Article 26 of ICESCR. Article 2.2 provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(1) of the ICCPR also provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

‘Language’ is listed in these articles of the ICESCR and the ICCPR as a discriminatory ground, however in assessing whether the measure is consistent with human rights, the purpose of the measure needs to be assessed. As outlined above, the purpose of the measure is to require Subclass 457 visa holders to have a required minimum level of English proficiency. The specific changes in these amendments will amend the English language criterion to replace the current requirements with an instrument making power.

Although the provisions concerned in this change are targeted towards Subclass 457 visa holders, the main objective of those provisions is to ensure those working in and living in Australia have minimum standards of English given English is the official language of Australia and possessing this standard of English is essential.

Therefore, while the measure does purport to affect a cohort of applicants differently, given English is essential for communication in Australia, this is an administrative measure which is considered reasonable, legitimate and proportionate in the circumstances.

Conclusion

The amendments in Schedule 5 are compatible with human rights as it does not raise any human rights issues.

The Hon. Scott Morrison, Minister for Immigration and Border Protection

Details of the Migration Amendment (2014 Measures No. 1) Regulation 2014

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on 22 March 2014.

The purpose of this section is to provide for when the amendments made by the Regulation commence.

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (the Act).

The purpose of this section is to set out the Act under which the Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms.

The purpose of this section is to provide for how the amendments in the Regulation are to operate.

Schedule 1 – Amendments relating to public interest criterion 4020

Item 1 – After subclause 4020(2) of Schedule 4

This item inserts subclause 4020(2A) and subclause 4020(2B) after subclause 4020(2) of Schedule 4 to the *Migration Regulations 1994* (the Principal Regulations).

Subclause 4020(1) requires that there must be no evidence that an applicant has given or caused to be given, a bogus document or information that is false or misleading in a material particular in relation to:

- the application for the visa; or
- a visa that the applicant held in the period of 12 months before the application was made.

In addition, subclause 4020(2) requires that the Minister must be satisfied that the applicant, and each member of their family unit, was not refused a visa for failing to meet the requirements of subclause 4020(1) during a period starting three years before the visa application was made and ending when the Minister makes a decision to grant or refuse the application.

However, under subclause 4020(4), the Minister may waive the requirements of subclause 4020(1) or subclause 4020(2) if satisfied that:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

Subclause 4020(2A) provides that a visa applicant satisfies the Minister as to the applicant's identity.

Subclause 4020(2B) provides that the Minister is satisfied that during the period:

- starting 10 years before the application was made; and
- ending when the Minister makes a decision to grant or refuse the application;

neither the applicant, nor each member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

The effect of subclauses 4020(2A) and (2B) is that to satisfy PIC 4020 the applicant is also required to satisfy the Minister as to their identity. Further, the applicant is required to satisfy the Minister that they and each member of their family unit, have not been refused a visa because they failed to satisfy the Minister as to their identity under subclause 4020(2A), where this refusal occurred within a period starting ten years before the visa application was made and ending when the Minister makes a decision to grant or refuse the application.

A ten year period under subclause 4020(2B) operates concurrently, not cumulatively, with a second ten year period under subclause 4020(2B), or with the three year time period under subclause 4020(2).

For example, under the amendments, if a visa applicant applied for two visas, and is refused the first visa on 1 July 2014 on the basis that they did not satisfy new subclause 4020(2A), and is refused the second visa on 1 July 2023 on the basis that they did not satisfy subclause 4020(1), the applicant would not meet the requirements of clause 4020 if they applied for a visa before 1 July 2026.

In other words, if the applicant applied for a visa which requires the applicant to meet clause 4020 before 1 July 2024, the applicant could not be granted that visa because they could not meet the requirements of subclause 4020(2B), and between 1 July 2023

and 1 July 2026 they would also be unable to meet the requirements of subclause 4020(2).

If a member of the family unit of that same applicant was then refused a visa on the grounds of subclause 4020(2A) on 1 July 2025, both the applicant and the member of the family unit would be unable to be granted a visa which requires the applicant to meet clause 4020 before 1 July 2035.

Unlike the Minister's ability to waive the requirements of subclauses 4020(1) and (2), the Minister does not have the ability to waive the requirements of subclauses 4020(2A) and (2B).

The purpose of this amendment is to strengthen the integrity of the migration programme and deter identity fraud by introducing strict consequences where a visa application is refused because the applicant, or a member of their family unit, failed to satisfy the Minister as to their identity.

Schedule 2 – Amendments relating to Subclass 202 (Global Special Humanitarian) visas for applicants proposed by minors

Item 1 – Subclause 202.222(1) of Schedule 2

This item repeals and substitutes subclause 202.222(1) of Schedule 2 to the Principal Regulations.

The repealed subregulation 202.222(1) provided that, if the applicant met the requirements of subclause 202.211(2) at the time of application and the applicant's proposer:

- is, or has been, the holder of a Subclass 202 (Global Special Humanitarian) visa (Subclass 202 visa); or
- was less than 18 years old at the time of application and is, or has been, the holder of:
 - a Subclass 866 (Protection) visa (Subclass 866 visa); or
 - a Resolution of Status (Class CD) visa (class CD visa);

the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa having regard to the extent of the applicant's connection with Australia.

Substituted subclause 202.222(1) provides that, if:

- the applicant met the requirements of subclause 202.211(2) at the time of application; and
- the applicant's proposer is, or has been, the holder of a Subclass 202 visa;

the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa having regard to the extent of the applicant's connection with Australia.

This item ensures that, except in the case of applicants who are proposed by a person who is, or has been, the holder of a Subclass 202 visa, the Minister is required to be satisfied that there are compelling reasons for giving special consideration to granting the applicant a Subclass 202 visa, having regard to:

- the degree of discrimination to which the applicant is subject in the applicant's home country; and
- the extent of the applicant's connection with Australia; and
- whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from discrimination; and
- the capacity of the Australian community to provide for the permanent settlement of the applicant in Australia.

For applicants who are proposed by a person who is, or has been, the holder of a Subclass 202 visa, the Minister is only required to examine the extent of the applicant's connection with Australia in deciding whether there are compelling reasons for giving special consideration to granting the applicant a Subclass 202 visa (family connection criterion). This is the case regardless of the proposer's age.

The vast majority of minor proposers are people who have come to Australia through unauthorised maritime means and have been granted a Subclass 866 visa or a Class CD visa. It is the Government's policy intention to discourage irregular migration by ensuring that people who have come to Australia via unauthorised maritime means are not given any benefits compared to people who have come to Australia via regular migration pathways.

Accordingly, the purpose of this item is to implement the Government's policy intention by ensuring that applicants who are proposed by a minor proposer who is, or has been, the holder of a Subclass 866 visa or a Class CD visa are assessed against all the criteria in subclause 202.222(2), as are most other applicants. Applicants who are proposed by current or former Subclass 202 visa holders continue to be assessed against only the family connection criterion because Subclass 202 visa holders have been accepted as eligible offshore applicants and have entered Australia legally on that visa.

Schedule 3 – Amendments relating to inserting public interest criterion 4020 into various visa subclasses

Items 1 to 3 – Paragraphs 416.223(a), 416.323(a), 417.221(2)(b) and 462.221(b) and clause 488.223 of Schedule 2

These items insert Public Interest Criterion (PIC) 4020 into each of the following provisions under Schedule 2 of the Principal Regulations listed below:

- paragraph 416.223(a);
- paragraph 416.323(a);
- paragraph 417.221(2)(b);

- paragraph 462.221(b); and
- clause 488.223.

Existing subclause 4020(1) requires that there must be no evidence that an applicant has given or caused to be given, a bogus document or information that is false or misleading in a material particular in relation to:

- the application for the visa; or
- a visa that the applicant held in the period of 12 months before the application was made.

In addition, subclause 4020(2) requires that the Minister must be satisfied that the applicant, and each member of their family unit, was not refused a visa for failing to meet the requirements of clause 4020(1) during a period starting 3 years before the visa application was made and ending when the Minister makes a decision to grant or refuse the application.

Under subclause 4020(4), the Minister may waive the requirements of subclause 4020(1) or subclause 4020(2) if satisfied that:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

Currently, section 109 of the Act provides that the Minister, after deciding under section 108 that there was non-compliance by the visa holder, and considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b), and having regard to any prescribed circumstances, may cancel a visa. The prescribed circumstances in considering whether to cancel the visa are provided in regulation 2.41 of Part 2 to the Principal Regulations. This section only allows a Minister to cancel a visa already held by a visa holder, and does not permit a refusal to grant a visa application.

Section 501 of the Act allows the Minister to refuse the grant of or to cancel a visa on character grounds. Previously, the provision of false or misleading information did not necessarily lead to the conclusion that the applicant does not pass the character test. It is intended that low level migration fraudulent activities or behaviour be addressed by the introduction of PIC 4020.

The amendments operate to require applicants for a Subclass 416 (Special Program) visa, a Subclass 417 (Working Holiday) visa, a Subclass 462 (Work and Holiday) visa and a Subclass 488 (Superyacht Crew) visa to satisfy PIC 4020. That is, both the applicant seeking to satisfy the primary criteria for these visa subclasses and each member of his or her family unit must satisfy PIC 4020.

The purpose of this amendment is to strengthen the integrity of those visa programmes by requiring applicants for those programmes to provide correct and non-misleading information. It is intended that the amendment will also facilitate the management of visa applicants who provide false or misleading information in the relevant visa subclasses.

Schedule 4 – Amendments relating to the release of information to the police

The purpose of these amendments is to assist the department to monitor compliance to conditions by individuals who are subject to residence determinations and to give effect to the Minister’s personal power to revoke residence determinations in the public interest.

Relevantly, one of the conditions routinely specified in a residence determination is that the person covered by it must obey the law. If the person does not comply with that condition, the Minister may revoke the determination pursuant to subsection 197AD(1) of the Act.

It is intended that the amendments authorise the disclosure of information of a person or a class of persons covered by a residence determination to the Australian Federal Police or the police force or police service of a State or Territory (the Police).

The disclosure is consistent with the *Privacy Act 1988*, specifically to Australian Privacy Principle 6.2(b), where ‘the use or disclosure of the information is required or authorised by or under an Australian law or a court/Tribunal order’.

In addition, the amendments make minor changes to the wording of subregulations 5.34F(1) and (2). These changes are not intended to change the meaning of regulation 5.34F, but are simply to make the changes necessary to ensure that regulation 5.34F would also apply to a person or class of persons covered by residence determinations.

Item 1 – Subregulations 5.34F(1) and (2)

This item repeals and substitutes subregulations 5.34F(1) and (2) of Part 5 to the Principal Regulations.

Substituted subregulation 5.34F(1)

Substituted subregulation 5.34F(1) adds to previous subregulation 5.34F(1) to include persons or class of persons covered by a residence determination.

The purpose of this amendment is to provide that regulation 5.34F also applies to a person or class of persons covered by residence determinations. If a person ceases to be covered by a residence determination the Minister cannot authorise the disclosure of that person’s information under the Regulation and any authorisation in respect of persons covered by a residence determination will cease to apply to that person. Were such a person to again become covered by a residence determination, the Minister may authorise the disclosure of their information and they may again come within the

scope of any existing authorisation in respect of persons covered by a residence determination.

Consequently, it is intended that the Minister, or the Minister's delegate, may authorise the disclosure of information about:

- a person who is covered by a residence determination; or
- a class of persons covered by residence determinations; or
- all people covered by residence determinations.

Substituted subregulation 5.34F(2)

Previous subregulation 5.34F(2) provides that the Minister may authorise the disclosure of any information mentioned in subregulation 5.34F(4) about the person or class to the Australian Federal Police or the police force or police service of a State or Territory. Substituted subregulation 5.34F(2) substitutes the words 'or class' with the phrase ', or a class of such persons,'.

This amendment is consequential to substituted subregulation 5.34F(1) to ensure that the relevant disclosure of information also applies to a person or a class of persons covered by residence determinations.

Schedule 5 – Amendments relating to English language requirements for Subclass 457 visas

The Temporary Business Entry Migration Programme (the Programme) is designed to enable employers to address skilled labour shortages in Australia by recruiting skilled overseas workers where skilled local workers are not available in Australia. This Programme comprises of three distinct stages:

- the first stage requires the person seeking to become a sponsor to apply for approval as a sponsor. If the person is already a sponsor, then they may apply to vary the terms of approval as a sponsor;
- the second stage requires the sponsor to nominate an occupation in relation to a holder of, or an applicant or a proposed applicant, for a Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa); and
- the third stage requires the person who is proposed to be nominated for sponsorship to apply for a Subclass 457 visa. This stage would not apply to a person who already holds a Subclass 457 visa.

The purpose of the amendments in this Schedule is to ensure the department's English proficiency threshold (in substituted paragraph 457.223(4)(eb) and substituted subparagraph 2.72(10)(g)(iv)) reflects industry requirements.

Item 1 – Subparagraph 2.72(10)(g)(ii)

This item repeals and substitutes subparagraph 2.72(10)(g)(ii) of Part 2A to the Principal Regulations.

Previously, regulation 2.72 relevantly provided for the criteria for the approval of a standard business sponsor's nomination of an occupation in relation to a holder of, or an applicant or proposed applicant, for a Subclass 457 visa.

Subparagraph 2.72(10)(g)(ii) relevantly set the requirement that, if a standard business sponsor in their nomination, identifies the holder of a Subclass 457 visa who:

- had a base rate of pay of at least the salary level specified by the Minister in the instrument for subclause 457.223(6); and
- no longer meets the requirements of subclause 457.223(6); and
- would be required to hold a licence, registration or membership to perform the holder's nominated occupation;

then the holder must demonstrate competent English, proficient English or superior English of at least the standard (however described) required for the grant of the licence, registration or membership.

Substituted subparagraph 2.72(10)(g)(ii) substitutes the words in current subparagraph 2.72(10)(g)(ii) with:

- if the holder would be required to hold a licence, registration or membership that is mandatory to perform the occupation nominated in relation to the holder; and
- in order to obtain the licence, registration or membership, the holder would need to demonstrate that the holder had undertaken a language test specified by the Minister under subparagraph 457.223(4)(eb)(iv) of Schedule 2 and achieved a score that is better than the score specified for the test by the Minister under subparagraph 457.223(4)(eb)(v) of Schedule 2;

the holder demonstrates that he or she has proficiency in English of at least the standard required for the grant (however described) of the licence, registration or membership.

The effect of the amendment is that reference to 'competent English, proficient English or superior English' is removed. Furthermore, the amendment ensures that any amendment to the threshold English proficiency level (in substituted paragraph 457.223(4)(eb) and substituted subparagraph 2.72(10)(g)(iv)) is automatically reflected in substituted subparagraph 2.72(10)(g)(ii) because it references the same legislative instrument that contains the English language proficiency requirements. Accordingly, subparagraph 2.72(10)(g)(ii) now accounts for any higher English proficiency level that a holder may need to demonstrate to obtain a licence, registration or membership.

Item 2 – Subparagraph 2.72(10)(g)(iv)

This item repeals and substitutes subparagraph 2.72(10)(g)(iv) of Part 2A to the Principal Regulations.

Subparagraph 2.72(10)(g)(iv) previously set the requirement that, if a standard business sponsor, in their nomination identified the holder of a Subclass 457 visa who:

- had a base rate of pay of at least the salary level specified by the Minister in the instrument for subclause 457.223(6); and
- no longer meets the requirements of subclause 457.223(6); and
- does not require a licence, registration or membership to perform their nominated occupation; and
- is not an exempt applicant within the meaning of subclause 457.223(4) of Schedule 2;

the holder of a Subclass 457 visa has vocational English.

Substituted subparagraph 2.72(10)(g)(iv) substitutes ‘vocational English’ with ‘unless subparagraph (ii) applies - the holder has undertaken a language test specified by the Minister under subparagraph 457.223(4)(eb)(iv) of Schedule 2 and achieved within the period specified by the Minister in a legislative instrument for this subparagraph, in a single attempt at the test, the score specified by the Minister under subparagraph 457.223(4)(eb)(v) of Schedule 2; and’.

The effect of the amendment is that the reference to ‘vocational English’ is removed and a new threshold English proficiency level, specified in the legislative instrument, is established. A ‘single attempt at the test’ means that the holder achieved the required score for the required test in a single test sitting as opposed to achieving the required test score across multiple test sittings.

Item 3 – Paragraph 2.72(10)(g) (note)

This item repeals the note in paragraph 2.72(10)(g) of Part 2A to the Principal Regulations.

The amendment repeals the note, which provides that Vocational English, competent English, proficient English and superior English are defined in regulations 1.15B to 1.15EA. The effect of the amendment is that references to ‘vocational English’, ‘competent English’, ‘proficient English’ and ‘superior English’ in relation to the approval of nominations for the Subclass 457 programme criteria are removed.

Item 4 – Subclause 457.111(1) of Schedule 2 (note)

This item omits the note in subclause 457.111(1) of Schedule 2 to the Principal Regulations.

The amendment omits the reference to the phrase ‘Vocational English is defined in regulation 1.15B’. The effect of the amendment is that reference to ‘vocational English’ in the Subclass 457 visa criteria is removed.

Item 5 – Subparagraph 457.223(4)(ea)(ii) of Schedule 2

This item repeals and substitutes subparagraph 457.223(4)(ea)(ii) (including the note) of Schedule 2 to the Principal Regulations.

Previously, paragraph 457.223(4)(ea) relevantly set the requirement that:

- if the applicant for a Subclass 457 visa would be required to hold a licence, registration or membership that is mandatory to perform the applicant's nominated occupation; and
- in order to obtain the licence, registration or membership, the applicant would need to demonstrate competent English, proficient English or superior English;

then the applicant has proficiency in English of at least the standard required for the grant (however described) of the licence, registration or membership.

Substituted subparagraph 457.223(4)(ea)(ii) substitutes the words in previous subparagraph 457.223(4)(ea)(ii) with 'in order to obtain the licence, registration or membership, the applicant would need to demonstrate that the applicant has undertaken a language test specified by the Minister under subparagraph 457.223(4)(eb)(iv) of Schedule 2 and achieved a score that is better than the score specified by the Minister under subparagraph 457.223(4)(eb)(v) of Schedule 2;'.

The effect of the amendment is that the reference to 'competent English', 'proficient English' or 'superior English' is removed. Furthermore, the amendment ensures that any amendment to the threshold English proficiency level (in substituted paragraph 457.223(4)(eb) and substituted subparagraph 2.72(10)(g)(iv)) is automatically reflected in substituted subparagraph 457.223(4)(ea)(ii) because it references the same legislative instrument that contains the English language proficiency requirements. Accordingly, subparagraph 457.223(4)(ea)(ii) accounts for any higher English proficiency level that a holder may need to demonstrate to obtain a licence, registration or membership.

Item 6 – Paragraph 457.223(4)(eb) of Schedule 2

This item omits all the words after subparagraph 457.223(4)(eb)(iii) of Schedule 2 to the Principal Regulations and in their place substitutes with the phrase 'the applicant:' and subparagraphs 457.223(4)(eb)(iv) and (v).

Previously, paragraph 457.223(4)(eb) relevantly set the requirement that, if the applicant for a Subclass 457 visa is:

- not an exempt applicant within the meaning of subclause 457.223(4); and
- subclause 457.223(6) does not apply to them; and
- at least 1 of the subparagraphs 457.223(4)(ea)(i) and (ii) does not apply;

then the applicant has vocational English.

Substituted subparagraphs 457.223(4)(eb)(iv) and (v) remove reference to 'the applicant has vocational English' and substitute it with:

the applicant:

- has undertaken a language test specified by the Minister in a legislative instrument for this subparagraph; and
- achieved within the period specified by the Minister in the instrument, in a single attempt at the test, the score specified by the Minister in the instrument; and

The effect of the amendment is that reference to ‘vocational English’ is removed and that the new threshold English proficiency level would be specified by the Minister in the legislative instrument for substituted subparagraphs 457.223(4)(eb)(iv) and (v). A ‘single attempt at the test’ means that the applicant achieved the required score for the required test in a single test sitting as opposed to achieving the required test score across multiple test sittings.

Schedule 6 – Amendments relating to transitional arrangements

Item 1 – At the end of Schedule 13

This item amends Schedule 13 of the Principal Regulations to insert a Part 27, entitled ‘Amendments made by the Migration Amendment (2014 Measures No. 1) Regulation 2014’, which would include clauses 2701, 2702 and 2703.

Inserted clause 2701, entitled ‘Operation of Schedules 1 to 3’, provides that the amendments of these Regulations made by Schedules 1 to 3 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* apply in relation to the following applications for a visa:

- an application made, but not finally determined, before 22 March 2014;
- an application made on or after 22 March 2014.

Inserted clause 2702, entitled ‘Operation of Schedule 4’, provides that the amendment of these Regulations made by Schedule 4 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* applies in relation to a person covered by a residence determination on or after 22 March 2014.

Inserted clause 2703, entitled ‘Operation of Schedule 5’, provides that the amendments of these Regulations made by Schedule 5 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* apply in relation to:

- the following applications for a visa:
 - an application made, but not finally determined, before 22 March 2014;
 - an application made on or after 22 March 2014; and
- the following nominations by an approved sponsor under section 140GB of the Act:
 - a nomination made, but not finally determined, before 22 March 2014;
 - a nomination made on or after 22 March 2014.

The purpose of these amendments is to clarify to whom the amendments in the Regulation applies to.