

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Chest X-ray Requirements) Regulations 2019

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act. In addition, regulations may be made pursuant to subsection 31(3) of the Migration Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

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

Australia's migration framework requires applicants for permanent visas and some temporary visas to satisfy health requirements to ensure they do not pose a risk to the Australian community or compromise Australia residents' access to health services.

The *Migration Amendment (Chest X-ray Requirements) Regulations 2019* (the Regulations) relate to certain unauthorised maritime arrivals (UMAs). The meaning of 'unauthorised maritime arrival' is contained in section 5AA of the Migration Act. The temporary protection visas for which UMAs may be able to apply are the Subclass 785 (Temporary Protection) visa and the Subclass 790 (Safe Haven Enterprise) visa.

Applicants for these visas are subject to chest x-ray requirements. The purpose of a chest x-ray is to screen for tuberculosis. An applicant under the age of 11 is generally not required to undergo a chest x-ray.

Holders of these visas may need to make another application for either visa. In this situation, the original chest x-ray meets the requirements for the subsequent visa application. However, applicants who were under the age of 11 when they previously applied, and did not require a chest x-ray at that time, are currently required to provide an x-ray if they are aged 11 or older.

On 25 March 2018 an Independent Health Advice Panel (IHAP) member commissioned by the Department of Home Affairs to review health policy settings for UMAs provided in their advice there was no clinical benefit to UMA minors to undergo additional chest x-rays. The IHAP member's advice was reviewed and endorsed by a Medical Officer of the Commonwealth, as the Senior Clinical Advisor of the Department's clinical advice team.

There have been no asylum seeker boat arrivals since late 2013 so minors who arrived in this fashion have been in Australia for over five years and would have completed tuberculosis screening up to three times, most recently in early 2017. The health care of UMA minors is

managed entirely through the Australian public health system, including for those who were born in Australia, and they pose an extremely low health risk to the community. The review recommended that the requirement for age related chest x-rays be removed, and this amendment implements that recommendation.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

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

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made to the Regulations, and has advised that a RIS is not required. The OBPR reference is 2412.

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

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 2 March 2019, and apply to applications for Subclass 785 (Temporary Protection) visas or Subclass 790 (Safe Haven Enterprise) visas made, but not finally determined, before 2 March 2019, as well as to applications for those Subclasses of visa made on or after 2 March 2019. The changes made by the Regulations are beneficial, and do not adversely impact the accrued rights of affected visa applicants; as a result, they are being applied to the “pipeline” of Subclass 785 (Temporary Protection) and Subclass 790 (Safe Haven Enterprise) visa applications made, but not finally determined, before 2 March 2019.

ATTACHMENT A**AUTHORISING PROVISIONS**

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

In addition, the following provisions of the Migration Act may apply:

- paragraph 46(1)(b), which provides that, subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if, it satisfies the criteria and requirements prescribed under this section; and
- subparagraph 65(1)(a)(ii), which provides that subject to sections 84 and 86, after considering a valid application for a visa, the Minister, if satisfied that the other criteria for it prescribed by this Act or regulations have been satisfied, is to grant the visa.

Statement of Compatibility with Human Rights

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

Migration Amendment (Chest X-ray Requirements) Regulations 2019

This Disallowable 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*.

Overview of the Disallowable Legislative Instrument

The amendments to the *Migration Regulations 1994* (the Regulations) will remove the requirement for a chest x-ray for Unauthorised Maritime Arrival (UMA) minors who have turned eleven years of age since the grant of their last Temporary Protection (Class XD) (Subclass 785) visa (TPV) or Safe Haven Enterprise (Class XE) (Subclass 790) visa (SHEV) and who are applying for a subsequent TPV or SHEV.

Currently subclause 785.223(3) and subclause 790.223(3) requires minors who have turned eleven years of age since the grant of their last TPV or SHEV to undertake a chest x-ray for tuberculosis screening. UMA minors, however, would have already completed these examinations while they were in immigration detention or as part of a previous TPV or SHEV application. If the minor was born to UMAs in Australia, they have lived their whole life in Australia. As such, UMA minors would have completed tuberculosis screening up to three times and/or had their health care managed through the public health system in Australia.

An Independent Health Advice Panel (IHAP) member commissioned by the Department of Home Affairs to review health policy settings for UMAs found there was no clinical benefit to UMA minors to undergo additional chest x-rays as they pose an extremely low health risk to the community.

The amendments add a new subclause at the end of clause 785.223 and clause 790.223 to specify UMA minors who have turned 11 since the grant of their last TPV or SHEV do not need to undertake a chest x-ray.

These measures aim to remove the requirement for unnecessary chest x-rays that have been found to be of no benefit and to reduce a child's exposure to ionising radiation.

Human rights implications

Right to health

Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) states:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The UN Committee on Economic Social and Cultural Rights states in its General Comment No 14, 'the right to health must be understood as a right to the enjoyment of a variety of facilities,

goods, services, and conditions necessary for the realisation of the highest attainable standard of health.’

The Australian Radiation Protection and Nuclear Safety Agency notes that ‘the foetus and children are more sensitive to ionising radiation exposure than adults’¹.

Australia’s *Code of Practice for Radiation Protection in the Medical Applications of Ionizing Radiation 2008* establishes the regulatory requirements for the use ionizing radiation in medicine to ‘ensure that the risks associated with radiation exposure to the patient are optimised’². In section 2.1.1 it states:

Before a medical procedure involving exposure of an individual to ionizing radiation is approved or commenced, the procedure must be justified for that individual.

The amendments support these objectives by repealing the requirement for UMA minors to go through unnecessary medical tests which provide no benefit. The measures do not seek to remove or otherwise reduce the quality, availability or accessibility of health care for UMA minors in Australia.

The measures do not limit the right to health of other members of the community as there will be no increase in risk to public health. UMA minors are currently living in the community on either a TPV or SHEV and have already been screened for Tuberculosis.

Rights of the child

Article 3(1) of the Convention on the Rights of the Child (CRC) states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Government is committed to act in accordance with Article 3 of the CRC. These amendments positively engage this Article by promoting the healthy development of children by avoiding unnecessary exposure to ionising radiation.

The amendments also reduce the regulatory burden on UMA minors and their families by removing the need for excessive medical procedures.

Conclusion

This Legislative Instrument is compatible with human rights as the measures which engage human rights do so on the basis that those rights are advanced.

The Hon. David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs

¹ <https://www.arpansa.gov.au/understanding-radiation/what-is-radiation/ionising-radiation/health-effects>

² <https://www.arpansa.gov.au/sites/default/files/legacy/pubs/rps/rps14.pdf>

ATTACHMENT C**Details of the *Migration Amendment (Chest X-ray Requirements) Regulations 2019*****Section 1 – Name**

This section provides that the title of the Regulations is the *Migration Amendment (Chest X-ray Requirements) Regulations 2019* (the Regulations).

Section 2 – Commencement

This section is the formal enabling provision for the instrument (that is, for the whole of the Regulations). It provides that the instrument commences on 2 March 2019.

Section 3 – Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

The purpose of this section is to provide for how the amendments in these Regulations operate.

Schedule 1 – chest x-rays for Temporary Protection visas and Safe Haven Enterprise visas***Migration Regulations 1994*****Overview of amendments**

These amendments relate to certain unauthorised maritime arrivals (UMAs). The meaning of ‘unauthorised maritime arrival’ is contained in section 5AA of the Migration Act. The temporary protection visas for which UMAs may be able to apply are the Subclass 785 (Temporary Protection) visa and the Subclass 790 (Safe Haven Enterprise) visa.

Applicants for these visas are subject to chest x-ray requirements (see clauses 785.223 and 790.223). However, an applicant under the age of 11 is generally not required to undergo a chest x-ray (see subclauses 785.223(3) and 790.223(3)).

As the above visas last for fixed periods, varying from three to five years (see clauses 785.511 and 790.511), visa holders often need to make another application for either of these visas. In this situation, the original chest x-ray meets the requirements for the subsequent visa application. However, applicants who were under the age of 11 when previously applying and did not require a chest x-ray have been required to provide an x-ray if they are aged 11 or older.

A recent review has concluded that there is no benefit to requiring chest x-rays in this situation. The health care of UMA minors is managed entirely through the Australian public health system, and they pose an extremely low health risk to the community. There is no clinical benefit in requiring them to undergo additional health screening. The review recommended

that the requirement for chest x-rays be removed, and these amendments implement that recommendation.

Item 1 – Subclause 785.223(1) of Schedule 2

This item contains a technical amendment, consequential to the insertion of new subclause 785.223(5), by item 2, below.

Item 2 – At the end of clause 785.223 of Schedule 2

This item inserts new subclause 785.223(5) at the end of clause 785.223.

If an applicant satisfies new subclause 785.223(5), then they will satisfy the criterion in clause 785.223 (see subclause 785.223(1)).

An applicant will therefore satisfy new subclause (5) where they are a UMA, they hold or previously held a Subclass 785 (Temporary Protection) or Subclass 790 (Safe Haven Enterprise) visa, and at the time that they were granted that visa, they had satisfied (as a criterion for grant of that visa) subclause 785.223(3), 785.223(5) (ie, the subclause created by this amendment), subclause 790.223(3), or subclause 790.223(5) (ie, the subclause created by item 4 of these amendments).

The intended effect of the above is:

- where an applicant is a UMA; and
- is 11 years or older; and
- previously satisfied clause 785.223 or 790.223 on the basis of subclause (3), ie, that they were under 11 years of age and they were not a person in respect of whom a relevant medical practitioner had requested a chest x-ray examination (as mentioned in subclause 785.223(2) or 790.223(2))

then they are not required to have a chest x-ray examination as part of the criteria for grant of the visa.

An express reference to UMAs in new subclause 785.223(5) is necessary as there are other cohorts who can apply for these visas. Only the UMA cohort is intended to benefit from this concession.

The amendment also takes into account that holders of Subclass 785 (Temporary Protection) and Subclass 790 (Safe Haven Enterprise) visas may “switch” visas. That is, a Subclass 785 visa holder may decide to apply for a Subclass 790 visa, and vice versa.

Item 3 – Subclause 790.223(1) of Schedule 2

This item contains a technical amendment, consequential to the insertion of new subclause 790.223(5), by item 4, below.

Item 4 – At the end of clause 790.223 of Schedule 2

This item inserts new subclause 790.223(5) at the end of clause 790.223.

If an applicant satisfies new subclause 790.223(5), then they will satisfy the criterion in clause 790.223 (see subclause 790.223(1)).

An applicant will therefore satisfy new subclause (5) where they are a UMA, they hold or previously held a Subclass 790 (Safe Haven Enterprise) or Subclass 785 (Temporary Protection) visa, and at the time that they were granted that visa, they had satisfied (as a criterion for grant of that visa) subclause 785.223(3), 785.223(5) (ie, the subclause created by item 2 of these amendments), subclause 790.223(3), or subclause 790.223(5) (ie, the subclause created by this amendment).

The intended effect of the above is:

- where an applicant is a UMA; and
- is 11 years or older; and
- previously satisfied clause 785.223 or 790.223 on the basis of subclause (3), ie, that they were under 11 years of age and they were not a person in respect of whom a relevant medical practitioner had requested a chest x-ray examination (as mentioned in subclause 785.223(2) or 790.223(2))

then they are not required to have a chest x-ray examination as part of the criteria for grant of the visa.

An express reference to UMAs in new subclause 790.223(5) is necessary as there are other cohorts who can apply for these visas. Only the UMA cohort is intended to benefit from this concession.

The amendment also takes into account that holders of Subclass 790 (Safe Haven Enterprise) and Subclass 785 (Temporary Protection) visas may “switch” visas. That is, a Subclass 790 visa holder may decide to apply for a Subclass 785 visa, and vice versa.

Item 5 – In the appropriate position in Schedule 13

Part 82 – Amendments made by the Migration Amendment (Chest X-ray Requirements) Regulations 2019

This item inserts a new Part 82 in Schedule 13 (Transitional Arrangements) to the *Migration Regulations 1994*. New Part 82 makes transitional and savings provisions in respect of the amendments made by these Regulations.

Clause 8201 provides that the amendments made by this Schedule to the Regulations apply in relation to applications for Subclass 785 (Temporary Protection) visas or Subclass 790 (Safe Haven Enterprise) visas made, but not finally determined, before 2 March 2019; and also to applications for those Subclasses of visa made on or after 2 March 2019.

The change is beneficial, and does not adversely impact the accrued rights of affected visa applicants; as a result, it is being applied to the “pipeline” of Subclass 785 (Temporary Protection) and Subclass 790 (Safe Haven Enterprise) visa applications made, but not finally determined, before 2 March 2019.