EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 202 Visas) Regulations 2022

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 the provisions listed in Attachment A.

The *Migration Amendment (Subclass 202 Visas) Regulations 2022* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to enhance the operation of the Community Support Program (CSP), which allows community groups and individuals to propose and support applicants for entry to Australia under the Humanitarian Program. In particular, the Regulations:

- reduce the visa application charge (VAC) payable by primary applicants by approximately 60%, from $19,449 to $7,760;

- entirely remove the VAC payable by secondary applicants (family members), reducing it from $2,680 to Nil; and

- rationalise the requirement for Assurances of Support (AoS) in relation to secondary applicants (family members), by making the requirement discretionary, so that the requirement for an AoS can be limited to cases where the applicant is of working age, or close to working age, and may therefore be eligible to receive a social security payment that is recoverable from the relevant Australian supporters under the AoS.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at Attachment A.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

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.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference number is 2201573.

The Department of Home Affairs (the Department) consulted with the Department of Social Services and Services Australia. In addition, the reductions to the VAC respond to an independent review, *Investing in Refugees, Investing in Australia*, presented to the government in February 2019, and to a subsequent review conducted by the Commonwealth Coordinator-General for Migrant Services in 2020-21. The independent review was informed by targeted consultation with refugees, service providers and peak body organisations, academics and think tanks, business and industry groups, regional development organisations, youth settlement groups, and public servants working for Commonwealth, state, territory and local governments. The consultations undertaken accord with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on the day after registration on the Federal Register of Legislation.

The Department follows standard practices to notify clients about the Regulations, including updating its website and notifying peak bodies. The Department liaises directly with the community groups (Approved Proposing Organisations) who are formally involved in the operation of the CSP under a Deed of Agreement with the Department.

Further details of the Regulations are set out in Attachment C.

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

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

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations 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, the following provisions of the Migration Act may also be relevant:

- subsection 31(1), which provides that the regulations may prescribe classes of visas;
- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 45A, which provides that the regulations may prescribe that a non-citizen who makes an application for a visa is liable to pay a visa application charge if, assuming the charges were paid, the application would be a valid visa application;
- paragraph 46(1)(b), which provides that a visa application is valid if, and only if, it satisfies the criteria and requirements prescribed under section 46;
- paragraph 46(1)(ba), which provides that a visa application is valid if, and only if, any visa application charge that the regulations require to be paid at the time the application is made has been paid, subject to the regulations providing otherwise;
- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application; and
- paragraph 46(4)(a), which provides that, without limiting subsection 46(3), the regulations may prescribe the circumstances that must exist for an application for a visa of a specified class to be a valid application.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (Subclass 202 Visas) Regulations 2022

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 Community Support Program (CSP) allows community groups and individuals to propose and support applicants for entry to Australia under the Humanitarian Program. Supporters propose eligible applicants, fund the applicant's visa process and settlement in Australia, and enter into an Assurance of Support (AoS) agreement requiring them to repay the Australian Government for any specified social security payments that the Government makes to the CSP entrant.

The Disallowable Legislative Instrument amends the *Migration Regulations 1994* (the Regulations) to reduce the total visa application charge (VAC) payable by CSP primary applicants for Subclass 202 (Global Special Humanitarian) visas by approximately 60 per cent and removes the VAC entirely for secondary applicants (members of the family unit of the primary applicant). It is anticipated that the VAC reduction will result in an increase in the number of CSP visa application lodgements. This will enable the CSP to achieve its policy intention to operate at scale as an effective visa pathway that complements the other existing Refugee and Humanitarian Program visa categories.

The Disallowable Legislative Instrument also streamlines the AoS requirements by making the requirement discretionary for secondary applicants so that the secondary applicants can be excluded from the AoS requirement if they have not reached the age of 15, or if they have reached or are close to reaching pension age as defined in the *Social Security Act 1991*.

Under the AoS scheme that applies to Subclass 202 visa applications made under the CSP, an Australian supporter (known as an assurer) guarantees that they will repay certain social security payments received by a specified Subclass 202 visa holder (the assuree) in their first year in Australia. The AoS is administered by the Department of Social Services and Services Australia in accordance with provisions in Chapter 2C of the *Social Security Act 1991*. If the assuree receives one or more specified social security payments during the AoS period, Services Australia has the legal right and responsibility to recover the amount paid from the assurer through its normal debt recovery procedures.

The specified social security payments include:

- JobSeeker Payment
- Youth Allowance
- Austudy Payment
- Parenting Payment
- Special Benefit

Previously, clause 202.322A of Schedule 2 to the Regulations required that, if the Minister had requested an AoS in relation to the primary applicant, all secondary applicants must be covered by the primary applicant's AoS or a separate AoS. In hindsight, this clause was drafted too broadly, as it includes young children and elderly family members who would not be eligible for any of the recoverable social security payments covered by an AoS. This could cause processing inefficiencies, such as when a baby is born to a family late in the visa process. In this scenario, a separate AoS would need to be provided for the baby, potentially causing further delays in the assessment process.

The amendment allows the Department of Home Affairs (the Department) to limit the requirement for an AoS to CSP applicants who are of working age or close to working age (that is, from the age of 15 years to pension age) and therefore are most likely to access a recoverable payment. Decision makers will consider the ages of the secondary applicants at the time the AoS is requested as part of the visa assessment process, taking into account visa processing timeframes.

The amendments address findings from the independent Review into Integration, Employment and Settlement Outcomes for Refugees and Humanitarian Entrants, *Investing in Refugees, Investing in Australia* (the Shergold Review, delivered in February 2019), and the review of the CSP conducted by the Commonwealth Coordinator-General for Migrant Services in 2020-21. Key findings of these reviews state that the CSP provides a valuable alternative pathway to family reunion for humanitarian entrants, but some settings such as the high upfront cost and the complexity of the AoS requirements are a barrier to greater engagement with the program.

A transitional arrangement has been included in the amendments to ensure that CSP applicants who apply between 1 July 2022 (the announced start date) and the commencement date of the Regulations are not disadvantaged and are also afforded the reduced VAC.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

The amendments to the Regulations made by this Disallowable Legislative Instrument benefit CSP Subclass 202 visa applicants who are seeking to enter Australia. The amendments reduce the existing VAC required to apply for a CSP Subclass 202 visa and will enable the requirement for an AoS to be limited to those CSP Subclass 202 visa applicants who are of working age or close to working age, thereby aligning with the policy objective of the AoS scheme. These amendments are entirely beneficial and will make it easier for persons in need of humanitarian assistance to apply for and be granted a Subclass 202 visa to enter Australia under the CSP.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not engage Australia's human rights obligations.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT C

Details of the Migration Amendment (Subclass 202 Visas) Regulations 2022

Section 1 - Name

This section provides that the name of the Regulations is the *Migration Amendment (Subclass 202 Visas) Regulations 2022*.

Section 2 - Commencement

This section provides that the Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation.

Section 3 - Authority

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

Section 4 - Schedules

This section provides for how the amendments made by the Regulations operate.

Schedule 1 - Amendments

Part 1—Visa application charges

Migration Regulations 1994

Items [1] – [3]

The items amend subitem 1402(2) of Schedule 1 to the *Migration Regulations 1994* (the Migration Regulations) to reduce the visa application charge (VAC) payable by applicants for a Refugee and Humanitarian (Class XB) visa in cases where the application includes a proposal by an approved proposing organisation (APO).

The applications relate to the Subclass 202 (Global Special Humanitarian) visa, which is the visa that is used for the Community Support Program (CSP), under which Australian proposers can put forward applicants for inclusion in the Humanitarian Program. The APOs enter into a deed with the Department of Home Affairs relating to the proposal of applicants for a Subclass 202 visa and the provision and management of resettlement services to those applicants.

Previously, primary applicants for a Subclass 202 visa who are proposed by an APO paid a total of $19,449 in two instalments, the first instalment being $3,005 payable at the time of application and the second instalment being $16,444 payable before visa grant. Secondary applicants did not pay a first instalment and the second instalment, payable before visa grant, was $2,680.

The effect of the amendments is that, for applications lodged from the commencement date of the Regulations, the VAC payable by primary applicants is reduced by 60% to a total of $7,760 and the VAC for secondary applicants is entirely removed. For primary applicants, the new first instalment is $490 payable at the time of application. The second instalment is $7,270 payable before visa grant.

The reason for the amendments is that the cost of the visa has been identified as a significant disincentive to use of the CSP. The reductions are intended to encourage greater uptake of the CSP. It is hoped that the VAC reductions will result in a significant increase in the number of CSP visa application lodgements. This will enable the program to achieve its original intention to operate at scale and further contribute to Australia's successful Humanitarian Program,

The anticipated drop in revenue was accounted for in the 2021-22 Mid-Year Economic and Fiscal Outlook, which noted:

> *"From 1 July 2022, the Government will reduce the visa application charge to 40 percent of the current rate for applicants to the Community Support Program and remove it entirely for secondary applicants. It will also increase the number of places available in the program from 750 to 1,900 places by 2024-25. The changes to the Community Support Program are estimated to decrease receipts by $4.9 million over four years from 2021-22*."

As the Regulations were not made before 1 July 2022, a transitional provision has been included to ensure that applicants who apply between 1 July 2022 and the commencement date of the Regulations are not disadvantaged and are afforded the reduced VAC. The transitional provision is explained at item 7 below.

Part 2—Assurance of support requirements

Migration Regulations 1994

Items [4] – [6]

These items amend clauses 202.227A and 202.322A of Schedule 2 to the Migration Regulations. These clauses relate to the Assurance of Support (AoS) requirements that apply to primary and secondary applicants for a Subclass 202 visa if the application includes a proposal by an APO (under the CSP).

Under the AoS mechanism that applies to Subclass 202 visa applications made under the CSP, an Australian supporter (known as an assurer) guarantees that they will repay certain social security payments received by a specified Subclass 202 visa holder (the assuree) in their first year in Australia. The AoS is administered by the Department of Social Services and Services Australia in accordance with provisions in Chapter 2C of the *Social Security Act 1991*. If the assuree receives one or more specified social security payments during the AoS period, Services Australia has the legal right and responsibility to recover the amount paid from the assurer through its normal debt recovery procedures.

The specified social security payments include:

- JobSeeker Payment
- Youth Allowance
- Austudy Payment
- Parenting Payment
- Special Benefit.

The effect of the amendments is to provide a discretion in clause 202.322A in relation to whether to request an AoS for secondary applicants. Previously, all secondary CSP applicants were required to be covered by an AoS if the Minister had requested an AoS for the primary applicant. The amended clause 202.322A allows the Minister to decide whether an AoS is required on a case by case basis.

The reason for this change is that clause 202.322A was previously drafted too broadly, and this caused inefficiency and inconvenience for visa applicants. The clause was too broad because it required an AoS for young children and elderly family members who would not be eligible for any of the social security payments covered by the AoS, noting that the AoS only applies for the first 12 months after arrival in Australia. Inefficiency and inconvenience could arise because the number of applicants who can be assured by an individual assurer is limited. It was previously a limit of two adults (and unlimited children). Although this increased to four adults (and unlimited children) from 1 July 2022 (*Social Security (Assurances of Support) Amendment Determination 2022*), there will occasionally be families where this limit will be exceeded, e.g. a primary applicant, a spouse, two dependent children over the age of 18, and an elderly parent of a primary applicant who lives with the family. In this case, there are five adults and a separate assurer would be required for one family member. Another problem occurred in situations where a baby was born into the family late in the visa processing. A separate AoS had to be provided in relation to the baby. The amendments solve these problems.

The new discretion will be exercised to exclude the young and the elderly from the AoS requirement. Nothing is lost by excluding them, as the payments recoverable under the AoS are targeted at the working age population. At the lower end, family payments, such as Family Tax Benefit, paid in respect of children and young people, are not recoverable under the AoS. Youth Allowance is recoverable, but it is only accessible from age 16 (Special Benefit can be paid to some younger people, for example 15 year olds who are unable to live at home due to family breakdown). At the upper end, Subclass 202 visa holders of pension age can immediately access an Age Pension upon arrival in Australia, subject to meeting all other requirements including means tests. The Age Pension is not recoverable under the AoS. Accordingly, it is intended, under policy, to exclude secondary applicants from the AoS requirement if they have not reached the age of 15, or if they have reached, or are close to reaching, *pension age* as defined in the *Social Security Act 1991* (noting that the pension age has been increasing in increments for several years and will be raised to the age of 67 from 1 July 2023 for persons born on or after 1 January 1957).

Rather than build these age limits into the clause, it was decided to restructure clause 202.322A as a discretion, so that the detail of who to exempt can be determined flexibly under policy. For example, the policy would need to take account of the fact that the AoS is normally requested part way through visa processing, at a time when the applicants have been ‘screened in’ as suitable candidates for visa grant. Decision-makers would need to consider

the ages of the secondary applicants at that time, and take account of visa processing timeframes, in order to decide whether a particular secondary applicant could be a potential recipient of recoverable social security payments during the first 12 months in Australia.

Although the amendments create a new statutory discretion, it is not appropriate or necessary to provide for merits review of the decision to require an AoS. An AoS only has operative effect if one of the specified social security payments is received during the visa holder's first 12 months in Australia. The AoS does not create any impediment to an eligible visa holder accessing those payments if their assurer is no longer able to support them. The obligation of an assurer to repay the relevant amounts is an obligation voluntarily undertaken as part of the decision to propose a visa applicant under the CSP.

Part 3—Application and transitional provisions

Migration Regulations 1994

Item [7] – In the appropriate position in Schedule 13

This item inserts Part 112 in Schedule 13 to the Migration Regulations. The purpose of Part 112 is to provide for the application of the amendments made by the Regulations and to make transitional provisions.

Clause [11201] – Operation of Part 1 of Schedule 1 (Subclass 202 (Global Special Humanitarian) visas)

Clause 11201 provides that the amendments made by Part 1 of Schedule 1 apply in relation to an application for a Subclass 202 visa made on or after the commencement of that Part. That is, the reductions in the VACs for primary and secondary applicants apply to applications made on and after the commencement date, which is the day after the Regulations are registered on the Federal Register of Legislation. However, see also the transitional provision noted immediately below.

Clause [11202] – Transitional provision—application for Subclass 202 (Global Special Humanitarian) visa made on or after 1 July 2022

Clause 11202 provides a transitional provision to ensure that applicants who apply between 1 July 2022 (the announced date from which the VAC reductions were to occur) and the commencement date of the Regulations pay the same total VAC as applicants who apply on or after the commencement date. The applicants covered by the transitional provision will have paid the previous first instalment for primary applicants. This is accounted for by a reduction in the second instalment for those applicants.

The overall position in relation to the VACs, taking account of clause 11201 and 11202 is set out in the following table:

Applications made before 1 July 2022 (previous regulations continue to apply)

	VAC1	VAC2	Total
Primary applicants	$3,005	$16,444	$19,449
Secondary applicants	Nil	$2,680	$2,680

Applications made on or after 1 July 2022 and before commencement of the Regulations (transitional arrangement inserted by clause 11202)

	VAC1	VAC2	Total
Primary applicants	$3,005	$4,755	$7,760
Secondary applicants	Nil	Nil	Nil

Applications made on or after commencement of the Regulations (clause 11201)

	VAC1	VAC2	Total
Primary applicants	$490	$7,270	$7,760
Secondary applicants	Nil	Nil	Nil

Clause [11203] – Operation of Part 2 of Schedule 1 (Subclass 202 (Global Special Humanitarian) visas)

Clause 11203 provides that the amendments made by Part 2 of Schedule 1 apply in relation to a decision to grant or not to grant a Subclass 202 visa made on or after the commencement of that Part, whether the application for the visa was made before, on or after that commencement.

The effect of clause 11203 is that, from the commencement date of the Regulations, the requirement for an AoS for a secondary applicant will change from a mandatory requirement to a discretionary requirement in all applications that are before the Department at that time, as well as for applications made on or after the commencement date. As the change is beneficial for applicants, and will streamline visa processing in some cases (e.g. where a baby is born to applicants at a late stage in visa processing), it is appropriate to apply the change to all pending applications as well as future applications.