

## **EXPLANATORY STATEMENT**

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

### *Migration Act 1958*

#### *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023*

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.

The *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to provide that the prescribed person eligible to seek merits review of a decision to refuse a Subclass 309 Partner (Provisional) visa application where the visa could be granted in Australia is the applicant rather than the sponsor.

The partner visa program permits Australian citizens, permanent residents or eligible New Zealand citizens to sponsor their partners to live in Australia. Applicants for a Subclass 309 (Partner (Provisional) visa must usually be outside Australia to apply for and be granted the visa. If the application is refused, the applicant's sponsor has standing to seek merits review of the refusal decision by the Administrative Review Tribunal (AAT). Where persons are already in Australia on another visa and become the spouse or de-facto partner of an Australian partner sponsor, they may apply for and be granted a Subclass 820 Partner (Temporary) visa in Australia. Where Subclass 820 visa applications are refused, the applicants, themselves, have standing to seek merits review.

Under the *Migration Amendment (2021 Measures No.1) Regulations 2021*, COVID-19 concession provisions were inserted into the Migration Regulations to allow for the grant of a Subclass 309 visa in Australia, if the applicant was in Australia during the COVID-19 concession period to address that the visa applicant could not depart Australia during the travel restrictions. These regulations retained the position that standing to seek merits review of a refusal decision is held by the applicant's sponsor, to align with the merits review rights of Subclass 309 applicants who were unaffected by COVID-19 concession provisions.

On 20 August 2022, the *Migration Amendment (Subclass 100 and 309 Visa) Regulations 2022*; inserted 'relationship cessation provisions' (RCPs) into the Migration Regulations for Subclass 309 applicants who can be granted their visa in Australia under the COVID-19 concession. The RCPs allow certain Subclass 309 visa applicants to satisfy the criteria for the grant of the partner visa despite the relationship with their sponsor having ceased, either because the sponsoring partner has died, or because the applicant, or a member of the family unit of the applicant or the sponsor, has suffered family violence committed by the sponsor; and/or the applicant has custody

or access rights to at least one child in respect of whom the sponsoring partner also has custody or access rights to. These provisions already apply in relation to applicants for the onshore Subclass 820 partner visa, the purpose being to facilitate the stay of persons already in Australia, in these circumstances.

The Regulations allow Subclass 309 applicants who are in Australia and who could be granted their visa in Australia under the COVID-19 concession provisions, to have standing to seek merits review by the AAT if the visa application is refused. This addresses the issue that a sponsor may be unwilling, or unable, to apply for merits review if their relationship with the applicant has ceased. It also aligns merits review rights of Subclass 309 applicants that could be granted the visa in Australia, with Subclass 820 partner visa applicants who must be in Australia at the time the visa is granted.

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 and conditions 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. 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 A](#).

The Office of Best Practice (OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference is OBPR22-02485.

Consultation has been undertaken with a number of stakeholders including affected visa holders and applicants. No external consultation was undertaken as the amendments are entirely beneficial for visa applicants. This accords with section 17 of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on the day after the Regulations are registered on the Federal Register of Legislation.

Further details of the Regulations are set out in [Attachment B](#).

The Regulations amend the Migration Regulations which are exempt from sunsetting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunsetting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;

- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

## **ATTACHMENT A**

### **Statement of Compatibility with Human Rights**

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

#### **Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023**

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**

The *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to enable applicants who sought, and who were refused, a Partner (Provisional) (subclass 309) visa, to apply for merits review of that refusal at the Administrative Appeals Tribunal. This amendment will apply to applicants who could have been granted their subclass 309 visa in Australia under the COVID-19 concession.

#### *The COVID-19 concession*

The *Migration Amendment 2021 Measures No.1 Regulations 2021* (the 2021 Measures No.1) amended the Migration Regulations to mitigate the adverse consequence of COVID-19 related travel restrictions. These amendments enabled subclass 309 visa applicants to be granted their visa in Australia, if the application for the visa was made before the end of the COVID-19 concession period and the applicant for the visa was in Australia at any time during the concession period. Prior to the introduction of the 2021 Measures No.1, subclass 309 applicants were required to be located outside of Australia at the time of visa grant.

#### *The relationship cessation provisions*

The Migration Regulations contain relationship cessation provisions which allow certain Partner visa applicants to meet the primary criteria to be satisfied at the time of decision, despite their relationship with their sponsor having ceased, where the below circumstances apply:

- the sponsoring partner has died; or
- the applicant or a member for their family unit of the applicant or the sponsor has suffered domestic and family violence committed by the sponsor; and/or
- the applicant has custody or access rights to at least one child in respect of whom the sponsoring partner also has custody or access rights to.

The *Migration Amendment (Subclasses 100 and 309) Regulations 2022* further amended the Migration Regulations to enable access to certain relationship cessation provisions for subclass 309 visa applicants and holders whose visas have been, or can be, granted in Australia. These amendments ensured that subclass 309 visa applicants and holders were not disadvantaged by the 2021 Measures No.1, introduced on 18 February 2021, which temporarily allowed subclass 309 visa applicants to be granted their visa in Australia.

The Amendment Regulations allow the subclass 309 concession cohort, to have a right to seek merits review of a refusal decision.

## **Human rights implications**

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

## **Conclusion**

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Honourable Andrew Giles MP  
Minister for Immigration, Citizenship and Multicultural Affairs**

## **ATTACHMENT B**

### **Details of the *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023***

#### **Section 1 - Name**

This section provides that the name of the instrument is the *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023*.

#### **Section 2 – Commencement**

This section provides for the commencement of the instrument.

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The effect of the table is that the whole of the instrument commences the day after the instrument is registered.

#### **Section 3 - Authority**

This section provides that the instrument is 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 - Amendments**

##### ***Migration Regulations 1994***

###### **Item [1] – Paragraph 4.02(5)(r)**

This item repeals paragraph 4.02(5)(r) of Schedule 1 to the *Migration Regulations 1994* (the Migration Regulations) and substitutes a new paragraph 4.02(5)(r).

Paragraph 4.02(5)(r) sets out the person who may apply for review of a decision made to refuse to grant a Subclass 300 (Prospective Marriage) visa, or Subclass 309 (Partner (Provisional)) visa, where the application for either visa was made during the concession period described in subregulation 1.15N(1) and the applicant was in Australia at the time of the decision to refuse.

The current paragraph 4.02(5)(r) provides that the person who may apply for merits review of the refusal decision is the sponsor. New paragraph 4.02(5)(r) provides that the person who may apply for merits review, in relation to the Subclass 309 visa, is the applicant. It does, however, retain the sponsor as the person who may seek review of decisions to refuse to grant a Subclass 300 visa, where the application for the Subclass 300 visa was made during the concession period described in subregulation 1.15N(1). An applicant for a Subclass 300 visa cannot satisfy the visa criteria if the relationship with the sponsor has ended, for any reason. For this reason, it remains appropriate for the sponsor to retain standing to seek merits review of a refusal decision.

The effect of this amendment is to provide Subclass 309 applicants, who could be granted their Subclass 309 visa in Australia under the COVID-19 pandemic concession, with standing to seek merits review of a decision to refuse to grant their Subclass 309 visa, rather than the sponsor. The amendment reflects the merits review rights of applicants of onshore Subclass 820 Partner (Temporary) visa.

## **Part 2 – Application of amendments**

### ***Migration Regulations 1994***

#### **Item [2] – In the appropriate position in Schedule 13**

This item inserts new Part 116 – Amendments made by the *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023* in Schedule 13 (Transitional Arrangements) to the Migration Regulations.

Clause 11601 – Operation of amendments – provides that the amendment made by Part 1 of Schedule 1 to the *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023* applies in relation to a decision to refuse to grant a Subclass 309 visa made on or after the commencement of the Regulations, whether the visa application was made before, on or after commencement.

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