

EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Regulations 1994

Migration (Class of Persons) Amendment Instrument (LIN 23/046) 2023

- 1 The instrument, departmental reference LIN23/046, is made under paragraphs 200.211(1A)(a) and 201.211(1A)(a) of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations).
- 2 The instrument amends *Migration Regulations 1994 – Specification of a Class of Persons – IMMI 12/127* (IMMI 12/127)—also identified by the unique reference F2012L02566 on the Federal Register of Legislation—in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act). That subsection provides that a power to make a legislative instrument includes a power to amend or repeal that instrument in the same manner, and subject to the same conditions, as the power to make the instrument.
- 3 The instrument commences on the day after it is registered on the Federal Register of Legislation, and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 4 Divisions 200.2 and 201.2 of Schedule 2 to the Migration Regulations sets out the primary criteria for the Subclass 200 (Refugee) visa and the Subclass 201 (In-country Special Humanitarian) visa, respectively. If the Minister has specified, in an instrument in writing, one or more classes of persons for paragraphs 200.211(1A)(a) or 201.211(1A)(a), and a relevant Minister has certified that the applicant is in one of those classes and at risk of harm for a reason or reasons that relate to the applicant being in a class of persons, then the applicant will meet the requirements of subclauses 200.211(1A) and 201.211(1A).
- 5 Subclauses 200.211(1B) and 201.211(1B) each provide that before making the instrument mentioned in paragraphs 200.211(1A)(a) and 201.211(1A)(a), the Minister must consult the Prime Minister; the Minister for Finance and Deregulation; and any other relevant Minister that has an interest in the specification of that class of persons or that is affected by the specification.
- 6 The Afghan Locally Engaged Employee (LEE) program offers resettlement in Australia to eligible locally engaged Afghan employees at risk of harm due to their employment in support of Australia's 20 year military, diplomatic and development engagement in Afghanistan.
- 7 IMMI 12/127 provides that citizens of Iraq or Afghanistan who were employed in-country as LEE with the Department of Foreign Affairs (DFAT), Australian Defence Force (ADF), or, in the case of Afghanistan, also the then Australian Agency for International Development (AusAID) or the Australian Federal Police (AFP), within a certain time period, and who are assessed to be at a significant risk of harm as a result of this employment, are specified as a class of persons for the purposes of subclauses 200.211(1A) and 201.211(1A) of Schedule 2 to the Migration Regulations.

Independent Review into the Afghan Locally Engaged Employee Program

- 8 In 2021, a whole-of-government review of the program was recommended by the Senate Inquiry on Australia's Engagement in Afghanistan. The final report from the Independent Review into the Afghan Locally Engaged Employee Program (the Review) was delivered to Government on 20 March 2023. The report made eight recommendations to improve the design and delivery of the Afghan LEE Program. The Government has agreed to all eight recommendations.
- 9 Recommendation 5 of the Review recommended that the Government consider the making of a new legislative instrument that sets out criteria for eligibility for certification for Afghan locally engaged employees to:
 - revise the exclusion at paragraph 3(b) of IMMI 12/127 to ensure it does not exclude persons who are or were Afghan government or military officials or employed in a private security capacity and is consistent with the original intent of the program; and
 - ensure that the level of risk of harm that must be demonstrated is consistent with the enabling provisions.
- 10 As recommended by that report, the instrument amends IMMI 12/127 to remove the exclusion of those employed in a private security capacity and government and military officials, who were previously ineligible to be certified. After this removal, these classes of persons may be certified under the scheme, if they are found to be eligible Afghan LEEs at risk of harm due to their employment in support of Australia's mission in Afghanistan. Those employed in a private security

capacity and government and military officials will still need to demonstrate that they were employed with Australia to be eligible for certification under the program.

- 11 The report also recommended the closure of applications for certification by 30 November 2023 be included in legislative instrument IMMI 12/127. This will enable the Government to cease certification of Afghan LEE by 31 May 2024, as per recommendation 7 from the report.
- 12 The instrument seeks to amend IMMI 12/127 to:
 - remove references to the level of risk of harm so that it is aligned with subclauses 200.211(1A) and 201.211(1A) of Schedule 2 to the Migration Regulations, which refers only to risk of harm and does not qualify that it must be 'significant' or 'individual';
 - remove references to persons who are or were Afghan government or military officials or employed in a private security capacity as being excluded from applying for certification; and
 - add a closing date for requests for certification of 30 November 2023.

Consultation

- 13 The Minister consulted with the Prime Minister, the Minister for Finance, the Minister for Defence, the Minister for Foreign Affairs, and the Attorney-General before making this instrument, as required by subclauses 200.211(1B) and 201.211(1B) of Schedule 2 to the Migration Regulations.
- 14 Certifying agencies, that is the Department of Foreign Affairs and Trade, Department of Defence and the Australian Federal Police, have been consulted.
- 15 The Office of Impact Analysis (OIA) was also consulted and considered that the instrument dealt with matters of a minor or machinery nature and no regulatory impact statement was required. The OBPR reference number is OIA23-05020.

Details of the instrument

- 16 Section 1 sets out the name of the instrument.
- 17 Section 2 provides for the commencement of the instrument on the day after it is registered on the Federal Register of Legislation.
- 18 Section 3 provides that Schedule 1 amends IMMI 12/127.
- 19 In Schedule 1:
 - items 1 and 2 omit references to the terms "significant" and "significant individual" from section 2 and paragraph 3(a) of IMMI 12/127.
 - item 3 repeals paragraph 3(b) of IMMI 12/127, removing the exclusion of applicants who are, or were, an Afghan government or military official or employed in a private security capacity.
 - paragraph 4 amends subparagraph 4(iii) of IMMI 12/127 to provide that such applications can be made until 30 November 2023.

Parliamentary scrutiny etc.

- 20 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because an instrument made under Schedule 2 to the Migration Regulations is prescribed by subitem 20(b) of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. As a result, a Statement of Compatibility with Human Rights is not required.
- 21 The instrument was made by the Minister for Immigration, Citizenship and Multicultural Affairs, in accordance with paragraphs 200.211(1A)(a) and 201.211(1A)(a) of the Migration Regulations.

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