EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Australian Citizenship Act 2007

Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016

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.

The *Australian Citizenship Act 2007* (the Citizenship Act) sets out how you become an Australian citizen, the circumstances in which you may cease to be a citizen and some other matters related to citizenship.

Subsection 504(1) of the Migration Act and section 54 of the Citizenship Act (the Principal Acts) in effect provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Principal Acts.

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

The purpose of the *Migration Legislation Amendment (2016 Measures No.3) Regulation 2016* (the Regulation) is to amend the *Migration Regulations 1994* (the Migration Regulations) and the *Australian Citizenship Regulations 2007* (the Citizenship Regulations) to strengthen and update immigration and citizenship policy.

In particular, the Regulation amends the Migration Regulations and Citizenship Regulations to:

- Streamline the application process for Return (Residence) (Class BB) visas and support the Government's broader digital transformation agenda. The amendments remove the oral lodgement channels for Return (Residence) (Class BB) visas. The online and paper application form channels are retained;

- Clarify that payments of migration and citizenship fees and charges can be made using the PayPal payment option, and introduce a PayPal merchant fee for the use of the PayPal payment service. The amendments encourage clients to apply and pay for services through online facilities, and align with the Government's digital transformation agenda;

- Reflect the revised credit card surcharge amounts payable for certain fees and charges under the Migration Regulations and Citizenship Regulations;

- Introduce a new class of eligible non-citizens. The amendments make children born to an Unauthorised Maritime Arrival parent eligible non-citizens if one or both of

their parents is or has ever been an eligible non-citizen. This is to allow such children to be granted bridging visas pursuant to section 73 of the Migration Act;

- Rectify minor typographical errors, update or remove redundant provisions in the Migration Regulations that are technical in nature; and

- Support applicants for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa and a Partner (Temporary) (Class UK) visa by:

    - providing the Minister for Immigration and Border Protection (the Minister) with the power to request a police check from the sponsor and to refuse to approve the sponsorship of all visa applicants if this police check is not provided;
    - requiring the Minister to refuse to approve the sponsorship of each applicant for the visa if the sponsor has been convicted of a relevant offence and, as a result of those convictions, has a significant criminal record. However, the Minister may approve the sponsorship if he considers it reasonable to do so, having regard to certain matters; and
    - allowing the Department of Immigration and Border Protection (the Department) to disclose any conviction of the sponsor for a relevant offence to each visa applicant included in the sponsorship, with the sponsor's consent.

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 Regulation is compatible with human rights. A copy of the Statement is at Attachment B.

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

Details of the Regulation are set out in Attachment C.

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

Schedules 1, 2, 3, 4, 5 and 7 to the Regulation commence on 10 September 2016.

Schedule 6 to the Regulation commences on 18 November 2016.

In relation to the amendments made by Schedule 1,

The Office of Best Practice Regulation (the OBPR) has been consulted regarding the amendments made by the Regulation. The OBPR considers that the changes in the Regulation will not have a significant regulatory impact on business and no further analysis (in the form of a Regulation Impact Statement) is required. The OBPR consultation references are as follows:

- 20079 (Schedule 1);
- 20393 (Schedule 2);
- 20706 (Schedule 3);
- 20469 (Schedule 4);
- 21054 (Schedule 5); and

- 20843 (Schedule 6).

In relation to the amendments made by Schedule 1, no consultation was undertaken under section 17 of the *Legislation Act 2003* (the Legislation Act) because the amendment is minor and machinery in nature and the number of affected clients is minimal (around 20 per year). This accords with subsection 17(1) of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable.

In relation to the amendments made by Schedule 2, no consultation was undertaken under section 17 of the Legislation Act because the amendments do not substantially alter existing arrangements. This accords with subsection 17(1) of the Legislation Act which envisages consultations where appropriate and reasonably practicable.

In relation to the amendments made by Schedule 3, no consultation was undertaken under section 17 of the Legislation Act because the instrument does not substantially alter existing arrangements. This accords with subsection 17(1) of the Legislation Act which envisages consultations where appropriate and reasonably practicable.

In relation to the amendments made by Schedule 4, no consultation was undertaken under section 17 of the Legislation Act because the amendments support a more administratively efficient Subclass 050 (Bridging (General)) visa grant process for affected children and are therefore both a minor amendment and of a beneficial nature. This accords with subsection 17(1) of the Legislation Act which envisages consultations where appropriate and reasonably practicable.

In relation to the amendments made by Schedule 5, no consultation was undertaken under section 17 of the Legislation Act because this instrument is of a minor and machinery nature and does not substantially alter existing arrangements.

In relation to the amendments made by Schedule 6, the Department has consulted with the Department of Social Services, the Attorney General’s Department and the Office of the Australian Information Commissioner. Further consultation has occurred in relation to the Government's National Action Plan to Reduce Violence against Women and Children, of which the amendments in this Schedule form part.

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:

- subsection 31(3), which provides that the 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 sections 32, 35A, 37, 37A or 38B but not by sections 33, 34, 35, 38 or 38A of the Migration Act);

- 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 41(1), which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;

- subsection 45C(1), which provides that the regulations may provide that visa application charge may be payable in instalments, and specify how those instalments are to be calculated, and when instalments are payable;

- subparagraph 45C(2)(a)(i), which provides that the regulations may make provision for and in relation to the recovery of visa application charge in relation to visa applications;

- subparagraph 45C(2)(a)(ii), which provides that the regulations may make provision for and in relation to the way, including the currency, in which visa application charge is to be paid;

- subparagraph 45C(2)(a)(iii), which provides that the regulations may make provision for and in relation to working out how much visa application charge is to be paid;

- paragraph 45C(2)(b), which provides that the regulations may make provision for the remission, refund or waiver of visa application charge or an amount of visa application charge;

- paragraph 45C(2)(c), which provides that the regulations may make provision for exempting persons from the payment of visa application charge or an amount of visa application charge;

- subsection 46(2), which provides that, subject to subsection 46(2A), an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of this subsection; and under the regulations, the application is taken to have been validly made;

- 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;

- paragraph 46(4)(a), which relevantly 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; and

- paragraph 72(1)(b), which provides that an eligible non-citizen means a non-citizen who is in a prescribed class of persons.

Paragraph 54(a) of the *Australian Citizenship Act 2007* (the Citizenship Act) relevantly provides that the Governor-General may make regulations prescribing matters required or permitted by the Act.

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

- paragraph 46(1)(d), which provides that an application under a provision of the Citizenship Act must be accompanied by the fee (if any) prescribed by the regulations; and

- subsection 46(3), which provides that the regulations may make provision for and in relation to the remission, refund or waiver of any fees of a kind referred to in paragraph (1)(d).

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016

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 – Application for Return (Residence) (Class BB) visas

This amendment to the *Migration Regulations 1994* (the Migration Regulations) removes the oral lodgement channel for Resident Return Visas (RRV) applications. The online and paper RRV application (form 1085) channels are retained.

The purpose of this amendment is to allow the Migration Regulations to better support and facilitate a more consistent and streamlined approach to visa lodgement arrangements across all visa subclasses. This amendment also allows greater consistency with the Government's Digital Transformation agenda to provide low cost, user-centred and online services that better satisfy the needs of clients. The client service implications relate to a very small cohort of approximately 20 RRV applications per year who lodge their RRV applications over the phone.

The oral RRV application lodgement channel proposed for removal is outdated, does not meet integrity measures, has delay costs for clients and is largely redundant. The preferred lodgement channel is online visa applications which have faster lodgement, faster processing, consistency in client experience, clients can monitor the progress of their application and the client is not liable to pay the non-internet application charge. For those clients unable to lodge a RRV application online, the paper application form 1085 is still available.

These changes are regarded as non-controversial matters that will ultimately affect a very small cohort of clients that will have access to the online and paper 1085 visa application forms, as well as, assistance with enquiries through the various channels, including web, email, phone, face to face and social media.

Human rights implications

The amendments in this Schedule have been considered against each of the seven core international human rights treaties.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) states:

> *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.*

To the extent that the amendment to the Migration Regulations engages the obligations in Article 2(1) of the ICCPR by eliminating the option to submit a RRV application orally

(methods other than form 1085), the Government believes this measure is reasonable. This change impacts a very small cohort of RRV applications who will continue to have access to the online or paper visa application form 1085 in the same way as many other visas. Assistance with completing a RRV application will still be able to be sought through the various channels, including web, email, phone, face to face and social media.

Additionally, departmental guidelines such as the High Needs and Complex Clients (HNCC) guidelines will provide staff with support in assisting clients who are willing but unable to use online services for a range of reasons. This may be due to clients being in a remote location without access to a computer or a lack of internet access, and barriers, such as, a disability, language needs, literacy issues or unfamiliarity with digital technology.

The HNCC service matrix helps staff identify these clients and how to differentiate the needs for possible, partial or full assistance. This allows staff to determine what level of service needs to be provided to the client based on the combination of barriers and situations. For example, if an officer determines (using the HNCC assessment tool) that the client is categorised as a high needs or complex client, the officer may consider channels such as providing the client with further assistance by phone or in person.

The amendments in this Schedule may purport to affect a small cohort of applicants differently. However, any impact on that right is reasonable and proportionate to the goal of facilitating the making of RRV applications for the benefit or convenience of the vast majority of clients and, for the Department of Immigration and Border Protection (the Department) to handle and process those applications in the most efficient and timely manner. This will be a net benefit to clients.

Conclusion

The amendments in this Schedule are compatible with human rights.

Schedule 2 – Method of payment of citizenship and migration fees and charges

The Department is focused on encouraging clients to apply and pay for services through online facilities such as ImmiAccount. The Department introduced a surcharge to cover merchant fees on credit card transactions for Visa Application Charges in April 2014. Merchant fees and the associated bank fees are also currently passed on to clients who use credit cards to pay for sponsorship fees, nomination fees, and a range of other fees and charges paid online.

The amendments to the Migration Regulations and *Australian Citizenship Regulations 2007* (Citizenship Regulations) clarify that payments for migration and citizenship services can be made using the PayPal payment option. The PayPal payment method enables the Department to provide clients with increased options and flexibility in their dealings with the Department and reduce costs for credit card transactions. This is because PayPal has a credit card surcharge of 1%, which is less than the surcharge in place for payment with most other online payment mechanisms.

The amendments to the Migration Regulations and Citizenship Regulations will also provide legislative basis for the Department to apply a surcharge to cover the merchant fees charged by PayPal. The surcharge will be limited by the Reserve Bank of Australia (RBA) surcharging standards. Without these amendments to the Migration Regulations and Citizenship Regulations, the PayPal payment method is not financially sustainable in the long

term.

The recovery of merchant fees is allowed under the RBA surcharging standards and is consistent with the cost recovery guidelines issued by the Department of Finance. The Department plans to fully recover the merchant fee costs. Recovery of these costs is now commonplace across the Commonwealth.

Human rights implications

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

Conclusion

The amendments in this Schedule are compatible with human rights as they do not raise any human rights issues.

Schedule 3 – Credit card surcharge

The Department is continually encouraging clients to apply and pay for services through online facilities. The Department, prior to its merger with Australian Customs and Border Protection Services, introduced a surcharge in 2014 to recover merchant fees on all credit card transactions. The relevant surcharge currently applies to credit card payments made by clients when lodging a visa application (visa application charge) and credit card payments made for other fees and charges (such as sponsorship fees, nomination fees, and citizenship-related fees). The merchant fees are charged to the Department by the Commonwealth Bank and credit card providers when clients make credit card payments. These fees are currently passed on to clients by way of a credit card surcharge.

The credit card surcharge is imposed under the Migration Regulations and the Citizenship Regulations. The relevant provisions are as follows:

- regulation 5.41A of the Migration Regulations sets out the operation of the credit card surcharge, and relevantly states the credit card surcharge amounts which accompany payments using the credit card option.

- subregulation 12A(1) of the Citizenship Regulations sets out the credit card surcharge amounts, which accompany payments using the credit card option for fees set out in Schedule 3 of the Citizenship Regulations.

The Department has re-assessed the calculation of the surcharge amounts based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia. The revised and reduced credit card surcharge amounts are as follows: 0.98%for payments made by a Visa or MasterCard credit card, 1.4% for payments made by an American Express or Japan Credit Bureau credit card, and 1.99%for payments made by a Diners Club International credit card.

Human rights implications

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

Conclusion

The amendments in this Schedule are compatible with human rights as they do not raise any human rights issues.

Schedule 4 – Bridging visas for children born in migration zone to unauthorised maritime arrivals

Subdivision AF of Division 3 of Part 2 of the *Migration Act 1958* (the Migration Act) provides for the grant of bridging visas to non-citizens, and includes:

- section 73 (in order to be granted a bridging visa, a person must be an 'eligible non-citizen' and satisfy the relevant criteria for a bridging visa); and
- section 72 (sets out the circumstances in which a non-citizen is an eligible non-citizen, including where the person *'is in a prescribed class of persons'* (see paragraph 72(1)(b)).

Regulation 2.20 of the Migration Regulations prescribes the classes of persons who are eligible non-citizens for the purposes of the definition of 'eligible non-citizen' in section 72 of the Migration Act. New subregulation 2.20(11A) applies to a non-citizen who:

- is a person described in subsection 5AA(1A) of the Migration Act; and
- has a parent who is or was an eligible non-citizen.

Subsection 5AA(1A) of the Migration Act provides that a person is an ***unauthorised maritime arrival*** (UMA) if:

> *'(a) the person is born in the migration zone; and*
>
> *(b) a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and*
>
> *(c) the person is not an Australian citizen at the time of birth.'*

The purpose of new subregulation 2.20(11A) is to ensure that, where a child born in the migration zone is an UMA by virtue of subsection 5AA(1A), and one or both of the child's parents is or has been an eligible non-citizen, the child will also be an eligible non-citizen.

The majority of UMAs awaiting assessment of their claims for protection in Australia are managed in the community on bridging visas; specifically, Bridging E visas (BVEs). However, previously, the parents' eligible non-citizen status was not passed on to the child, meaning that these children generally did not meet the section 73 requirement for grant of a bridging visa. Where these children were not eligible non-citizens, the only mechanism to grant them a BVE was for the Minister to exercise his or her personal, non-delegable, non-compellable powers under the Migration Act. New subregulation 2.20(11A) will allow these children to be granted BVEs by officers of the Department.

Human rights implications

The amendments in this Schedule engages Article 3 of the Convention on the Rights of the Child (the CRC).

Article 3 of the CRC relevantly provides that, in all actions concerning a child, the best interests of the child shall be a primary consideration. The amendments confer eligible non-citizen status

on children born in the migration zone who are also UMAs by virtue of subsection 5AA(1A) of the Migration Act, where one or both of their parents is or has been an eligible non-citizen. This in turn allows officers of the Department to grant BVEs to these children, and therefore makes the BVE grant process more administratively efficient, which supports the best interests of affected children. The amendment therefore has a beneficial impact on these children.

In relation to the CRC, this amendment represents a positive engagement with the best interests of the child as a primary consideration and as such, is consistent with Article 3 of the CRC.

Conclusion

The amendements in this Schedule is compatible with human rights because it promotes the protection of human rights.

Schedule 5 – Technical amendments

The Department has identified a number of minor typographical errors and outdated provisions in the Migration Regulations. The amendments to the Migration Regulations are of a technical nature, with the intention of amending the identified technical errors in the Migration Regulations, and to maintain the consistency and readability of the provisions. These errors are minor and technical in nature.

Human rights implications

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

Conclusion

The amendments in this Schedule are compatible with human rights as they do not raise any human rights issues.

Schedule 6 – Family violence

This Schedule amends the the Migration Regulations to implement Action Item 11 of the Second Action Plan 2013-2016 of the National Plan to Reduce Violence against Women and their Children 2010-2022 (the Second Action Plan).

The Government is strongly committed to reducing the rates of family violence in this country. Everyone in Australia has the right to feel safe and live without fear of violence. The Government has publicly declared that the issue needs to be elevated to our national consciousness, and has made it clear that domestic, family or sexual violence is unacceptable in any circumstance. The Second Action Plan highlighted that:

> *women from culturally and linguistically diverse (CALD) backgrounds and new and emerging communities can face an increased risk of violence and additional challenges in accessing services and support.*

It also notes that:

> *(those) who experience violence can also face significant difficulties, including a lack of support networks, language barriers, socio-economic disadvantage, and lack of knowledge of their rights and Australia's laws.*

Action Item 11 of the Second Action Plan specifically states that:

> *overseas spouses entering Australia will receive strengthened support by requiring additional information disclosure by the Australian husband or fiancé applying for an overseas spouse visa.*

In order to implement this action item, these amendments allow the Department to disclose any conviction of the sponsor for a ***relevant offence*** to each applicant for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa, and a Partner (Temporary) (Class UK) visa (collectively referred to as the Partner and Prospective Marriage visas) unless the conviction has been quashed or otherwise nullified, or the sponsor had been pardoned.

A relevant offence is one against a law of the Commonwealth, a State, a Territory or a foreign country, involving any of the following matters:

(a) violence against a person, including (without limitation) murder, assault, sexual assault and the threat of violence;
(b) the harassment, molestation, intimidation or stalking of another person;
(c) the breach of an apprehended violence order, or a similar order, issued under a law of a State, a Territory or a foreign country;
(d) firearms or other dangerous weapons;
(e) people smuggling;
(f) human trafficking, slavery or slavery-like practices (including forced marriage), kidnapping or unlawful confinement;
(g) attempting to commit an offence involving any of the matters mentioned in paragraphs (a) to (f), or paragraph (h);
(h) aiding, abetting, counselling or procuring the commission of an offence involving any of the matters mentioned in paragraphs (a) to (g).

The amendments allow the Minister (or his delegate) to:

- request that the sponsor of an applicant for a relevant visa provide a police check from an Australian jurisdiction or from a foreign country;
- refuse to approve the sponsorship if the Minister requested that the sponsor provide a police check and the sponsor failed to do so within a reasonable time;
- refuse to approve the sponsorship, if the sponsor has a significant criminal record in relation to a relevant offence;
- decide to approve the sponsorship despite a significant criminal record in relation to a relevant offence where it is reasonable to do so and in consideration of certain matters (without limitation); and

- disclose the sponsor's convictions for relevant offences to the visa applicant, with the sponsor's consent.

For the purpose of this amendment, a significant criminal record is defined in new regulation 1.20KD and relates to sentences for life, sentences totalling 12 months or more and sentences of death.

However, a sentence imposed on the sponsor, or the conviction of the sponsor for a relevant offence, is to be disregarded if the conviction is quashed or otherwise nullified, or the sponsor has been pardoned and is taken never to have been convicted.

These amendments are intended to strengthen the integrity of the programme and improve support for applicants by giving the Department the ability to:

- share the sponsor's relevant offences with the applicant so they can decide whether to continue with the visa application process; and
- refuse to approve the sponsorship for people with serious and violent criminal pasts, and thereby preventing a visa from being granted to potentially vulnerable people.

These amendments are in addition to, and build on, existing provisions which ensure that minor visa applicants seeking to enter Australia on a Partner or Child visa, are protected from being sponsored by people with convictions for child sex or other serious offences indicating that they might pose a significant risk to a child in their care.

Human rights implications

Rights relating to the Family Unit

Article 17(1) of International Covenant on Civil and Political Rights 1966 (ICCPR) states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23(1) of ICCPR states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 10(1) of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) states:

The States Parties to the present Covenant recognize that:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

These amendments build on the existing ability to request a police check be provided by sponsors of certain Child and Partner visa applicants, where there is a minor child in the application. These existing measures ensure that minor visa applicants seeking to enter or remain in Australia on certain Partner or Child visas are protected from being sponsored by

people with convictions for child sex or other serious offences indicating they might pose a significant risk to a child in their care. These amendments recognise that some adult visa applicants can also be vulnerable.

In addition to the existing provisions, the Minister may refuse to approve sponsorship where the sponsor has a significant criminal record for a relevant offence.

The underlying principle is that visa applicants should, in determining if they wish to continue with a visa application, be able to make this decision based on information that may be relevant to their future safety and well-being. The Department obtains the consent of the sponsor to disclose relevant information to the visa applicants. Information sharing will strengthen the capacity of applicants themselves to identify and respond to family violence issues, where appropriate.

A significant criminal record is defined in new regulation 1.20KD and broadly relates to where a person has been sentenced to death, life imprisonment or imprisonment of 12 months or more.

Convictions for offences in these areas will not necessarily lead to refusal. Despite a conviction for a relevant offence, the delegate may decide to approve the sponsorship having regard to a range of factors including but not limited to:

- the length of time since the sponsor completed the sentence (or sentences) for the relevant offence or relevant offences;
- the best interests of any children of the sponsor or the primary applicant; and
- the length of the relationship between the sponsor and the primary applicant.

Natural justice will be provided prior to a final decision to refuse the application. Applications refused on sponsorship grounds have access to merits review by the Administrative Appeals Tribunal and judicial review by a court.

A decision to refuse to approve a sponsorship, or to refuse to grant a Partner or Prospective Marriage visa, will not in itself result in a family being separated or interference with the family. If an applicant is refused a visa, they will not be able to enter and reside in Australia, but that family may choose to live together in the applicant's home country. Any limitation on the rights in articles 17(1) and 23(1) of the ICCPR, or article 10(1) of the ICESCR, through the ability to refuse to grant a visa, is reasonable, necessary, and proportionate to achieve the legitimate policy objective, which is to inform and protect potentially vulnerable people from harm. The amendments aim to provide support to prospective migrants, including minor children, who are among the most vulnerable in the community.

In circumstances where the visa applicant is offshore, there is no right to family reunification under international law. The protection of the family unit under articles 17 and 23 of the ICCPR does not amount to a right to enter or remain in Australia where there is no other right to do so.

Rights relating to privacy

Sponsors for Partner or Prospective Marriage visas will be required to agree that the Department may disclose any relevant offences to the visa applicant, as a criterion for visa grant.

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Pursuant to article 17(1) of the ICCPR, any interference with an individual's privacy must have a lawful basis. In addition to requiring a lawful basis for limitation on the right to privacy, article 17 prohibits arbitrary interference with privacy. Interference which is lawful may nonetheless be arbitrary where that interference is not in accordance with the objectives of the ICCPR and is not reasonable in the circumstances.

The sponsor will have the option of choosing whether to consent to the Department disclosing relevant offences to the visa applicant. If the sponsor does consent to this disclosure, any personal information will be collected, used, stored and disclosed during this process in accordance with Australian domestic legislation, including the *Privacy Act 1988*. Any limitation of article 17(1) of the ICCPR is reasonable, proportionate and necessary to achieve the legitimate policy objective. The disclosure of this information to the visa applicant will ensure that visa applicants are aware of the sponsor's relevant history as it relates to instances of family violence, and any potential risk to their safety and the safety of their children.

Rights relating to children

In circumstances where a child is offshore, Australia's obligations under the Convention on the Rights of the Child (CRC) will not be enlivened. However, regardless of whether the child is onshore or offshore, the amendments are consistent with Australia's obligations under the CRC. In developing this amendment, the best interests of the child have been a primary consideration.

Article 3 of the Convention on the Rights of the Child 1989 (CRC) states:

1. 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.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

These amendments will advance the rights in article 3(2) of the CRC, which requires that *Parties undertake to ensure the child such protection and care as is necessary for his or her well-being*. The expansion of police checking to all sponsors and broadening the assessment

to include convictions that may indicate an increased risk of family violence strengthens the existing requirements and improves support for child applicants.

Consistent with article 3(1) of the CRC, when considering whether it is reasonable to approve the sponsorship, despite the sponsor having a significant criminal record, the Minister must consider the best interests of the children of both the sponsor and primary applicant. This waiver provision and the subsequent appeal mechanisms ensure that children will not be arbitrarily denied access to their parents or other family and that any decision made may be subject to merits and judicial review.

Article 9 of the CRC states:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 9(4) of the CRC anticipates that State actions may, in certain circumstances (for example, following deportation), result in a child being separated from a parent. A decision to refuse to approve a sponsorship, or to refuse to grant a Partner or Prospective Marriage visa, will not in itself result in a child being separated from a parent. However, if the child is refused a visa, they may not be able to enter and reside in Australia. It would be open to the applicant, sponsor and minor children to reside together in the applicant's home country. Consistent with article 9(1) of the CRC, when considering whether it is reasonable to approve the sponsorship the Minister must consider the best interests of the children of the sponsor and primary applicant. Consistent with article 9(1) of the CRC, a decision made in accordance with these amendments is subject to judicial review.

Consistent with article 9(2) of the ICCPR, natural justice will be provided prior to a decision being made on the visa application. This will allow the parties to make submissions in relation to the visa application that will be considered by the Minister's delegate prior to a decision being made.

Article 10 of the CRC states:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family

reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

Partner or Prospective Marriage visa applications will be considered and assessed, like any other visa application, in accordance with the law and procedures outlined in the Migration Act and the Regulations. Consistent with article 10 of the CRC, procedural fairness will be afforded and the interests of the child will be considered. No adverse consequences will entail for the applicant or members of their family unit as a result of making the visa application. Article 10 of the CRC does not amount to a right to enter and reside in Australia where there is no other lawful right to do so.

Rights relating to women

Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states:

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

The amendments advance the right under article 6 of CEDAW, by making provision for the Department to disclose to the applicant information about the sponsor's relevant offences, particularly as they relate to human trafficking, slavery or slavery-like practices (including forced marriage), kidnapping or unlawful confinement. The amendments allow the Minister to refuse to approve a sponsorship where the sponsor has a significant criminal record that relates to a relevant offence.

Conclusion

The amendments in this Schedule are compatible with human rights. The objective advances the protection of human rights, especially with regard to rights relating to women, the family unit and children. Where the amendments might limit human rights, such as those relating to the family unit and privacy, those limitations are reasonable, necessary, and proportionate to achieve the legitimate objective, which is to inform and potentially protect vulnerable people from harm.

ATTACHMENT C

Details of the *Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016*

Section 1 – Name

This section provides that the title of the Regulation is the *Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016*.

Section 2 – Commencement

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 table provides the following commencement dates for the amendments:

- Sections 1 – 4 - The day after this instrument is registered
- Schedules 1 – 5 - 10 September 2016
- Schedule 6 - 18 November 2016
- Schedule 7 - 10 September 2016

A note clarifies that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

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

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act) and the *Australia Citizenship Act 2007* (the Citizenship Act).

The purpose of this section is to set out the authority under which this instrument is made.

Section 4 – Schedule(s)

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

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

Schedule 1 – Applications for Return (Residence) (Class BB) visas

Migration Regulations 1994

Item 1 – Subregulation 2.09(1)

This item omits "Subject to subregulation (2)" in this subregulation. The amendment is consequential to the amendment made by Item 2, below, which repeals subregulations 2.09(2) and (3). The reference to "Subject to subregulation 2" is no longer necessary.

Item 2 – Subregulations 2.09(2) and (3)

This item repeals subregulations 2.09(2) and (3) of the *Migration Regulations 1994* (the Migration Regulations).

Regulation 2.09 provided for oral applications for visas where it is authorised by a provision of the relevant Schedule 1 item for that visa.

Subregulation 2.09(1) provided that if a person is in a specified class of persons authorised by Schedule 1 to the Migration Regulations that person may apply for a visa of that class by telephone to, or attendance at, an office of Immigration in Australia (as specified by the Minister in an instrument in writing for the purposes of the provision).

Subregulations 2.09(2) and (3) provided specific details in relation to oral applications for Resident Return Visas (RRVs).

Subregulation 2.09(2) provides that an oral application for a RRV may be made in person at an office of Immigration in Australia whether or not that office has been specified under subregulation 2.90(1).

Subregulation 2.09(3) provided that an oral application for an RRV may be made by telephone and during specified times.

The purpose of this amendment is to repeal the oral lodgement channel for RRVs. The amendment streamlines the application process for RRVs and supports the Department's strategy to provide services through lower cost digital channels as part of the Government's broader Digital Transformation agenda. The amendment retains the existing online and paper form lodgement options for RRVs.

The effect of this amendment is that the oral lodgement channel for RRVs is no longer available. The amendment does not affect the online and paper application form channels, which remain available.

Item 3 – Paragraph 1128(3)(ba) of Schedule 1

This item repeals paragraph 1128(3)(ba) of Schedule 1 to the Migration Regulations and is consequential to the repeal of subregulations 2.09(2) and (3) above.

Paragraph 1128(3)(ba) provided that an oral application must be made by an applicant in Australia, and in accordance with subregulation 2.09(2) or (3).

The purpose of this amendment is to repeal the oral lodgement channel for RRVs.

The effect of this amendment is that the oral lodgement channel for RRVs is no longer available. However, the amendment does not affect the online and paper application form channels, which remain available.

Schedule 2 – Method of payment of citizenship and migration fees and charges

Australian Citizenship Regulations 2007

Item 1 – Regulation 4

This item inserts the term ***PayPal surcharge*** into regulation 4 of Part 1 of the *Australian Citizenship Regulations 2007* (the Citizenship Regulations). The new definition provides for the term to have its meaning provided in subregulation 12A(1) of Part 3 of the Citizenship Regulations.

The purpose of this amendment is to facilitate the amendments at Item 3 of this Schedule, which inserts new paragraph 12A(1)(c) to provide the PayPal surcharge amount of 1% of so much of the Schedule 3 amount as is paid by the PayPal system.

Schedule 3 to the Citizenship Regulations provide for the monetary amounts to accompany an application under the Citizenship Act.

This amendment acts as a signpost to the appropriate provision under the Citizenship Regulations, which provides for the circumstances in which the relevant surcharge will apply and the amount of the surcharge.

Item 2 – Subparagraphs 12A(1)(b)(i), (ii) and (iii)

This item omits "the Schedule 3 amount" and substitutes it with "so much of the Schedule 3 amount as is" in subparagraphs 12A(1)(b)(i), (ii) and (iii) of the Citizenship Regulations.

The purpose of this amendment is to clarify that the credit card surcharge is to apply only to so much of the Schedule 3 amount as was paid using credit card, and not to the whole of the Schedule 3 amount.

The amended provisions will continue to operate as they did prior to this amendment.

Item 3 – At the end of subregulation 12A(1)

This item adds new paragraph 12A(1)(c) in Part 3 of the Citizenship Regulations.

New paragraph 12A(1)(c) provides that if the Schedule 3 amount, or part of the Schedule 3 amount, is paid by the PayPal system (other than a payment made in New Zealand currency or Singaporean currency) – the amount (the ***PayPal surcharge***) of 1% of so much of the Schedcule 3 amount as is paid by the PayPal system.

The purpose of this amendment is to allow recovery of the cost of processing a PayPal transaction, and to set out the PayPal surcharge that is applicable where the fee associated with a citizenship application is paid with the PayPal system.

The effect of this amendment is that applicants who use the PayPal payment method to pay fees associated with a citizenship application are liable to pay a PayPal surcharge of 1% of the amount of the payment. The 1% surcharge amount is equivalent to the service fee amount charged by the PayPal system. Consistent with the credit card surcharge provisions in subregulation 12A(1), the PayPal surcharge is not applicable for payments made by local currency in New Zealand and Singapore, because it does not accord with the domestic laws in those countries.

Item 4 – Paragraph 13(4)(c)

This item omits 'or 15A' in paragraph 13(4)(c) of the Citizenship Regulations.

This item is consequential to the amendments made in Item 7 of Schedule 6 to the *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014* which repealed table item 15A on 1 July 2014.

The purpose and effect of the amendment is to repeal the redundant reference to table item 15A. The provision will continue to operate as it did prior to the amendment.

Item 5 – Subregulation 13(4A)

This item inserts the term "or PayPal surcharge" after the first occurring term "credit card surcharge" in subregulation 13(4A) of the Citizenship Regulations.

The purpose of this amendment is to provide the Minister with the power to refund the relevant proportion of the PayPal surcharge in cases where the Minister refunds an amount of the fee payable under Section 46 of the Citizenship Act, and the fee included a PayPal surcharge.

The provision will continue to operate as it did prior to the amendment, with the additional power for the Minister to refund for fees which included a PayPal surcharge.

Item 6 – Subregulation 13(4A)

This item omits the second occurring term "credit card" in subregulation 13(4A) of the Citizenship Regulations.

This amendment is consequential to amendments made in Item 5 of the Regulation.

The provision will continue to operate as it did prior to the amendment, with the additional power for the Minister to refund for fees which included a PayPal surcharge.

Item 7 – Paragraph 13(5)(c)

This item omits reference to table item 15B of Schedule 3 to the Citizenship Regulations in paragraph 13(5)(c) of the Citizenship Regulations.

This item is consequential to the amendments made in Item 7 of Schedule 6 to the *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014* which repealed table item 15B on 1 July 2014.

The purpose and effect of the amendment is to remove the redundant reference to table item 15B. The provision will continue to operate as it did prior to the amendment.

Item 8 – Subregulation 13(5A)

This item inserts the term "or PayPal surcharge" after the first occurring phrase "credit card surcharge" in subregulation 13(5A) of the Citizenship Regulations.

The purpose of this amendment is to provide the Minister with the power to refund the relevant proportion of the PayPal surcharge in cases where the Minister refunds an amount of a fee payable under Section 46 of the Citizenship Act, and the fee included a PayPal surcharge.

The provision will continue to operate as it did prior to the amendment, with the additional power for the Minister to refund for fees which included a PayPal surcharge.

Item 9 – Subregulation 13(5A)

This item amends subregulation 13(5A) of the Citizenship Regulations by omitting the second occurring term "credit card".

The provision will continue to operate as it did prior to the amendment, with the additional power for the Minister to refund for fees which included a PayPal surcharge.

Migration Regulations 1994

Item 10 – At the end of subregulation 2.12JA(1)

This item amends subregulation 2.12JA(1) of the Migration Regulations to add new paragraph 2.12JA(1)(c) and Notes 1 and 2.

The purpose of paragraph 2.12JA(1)(c) is to clarify that payments for a visa application charge (VAC) in relation to an Internet application may be made using the PayPal payment method.

Note 1 provides that a credit card surcharge is payable if an instalment, or part of an instalment, of the VAC is paid by credit card, and makes reference to regulation 5.41A of the Migration Regulations. This note was previously at the end of subregulation 2.12JA(2), which was repealed by Item 11 of the Regulation.

Note 2 provides that a PayPal surcharge is payable if an instalment, or part of an instalment, of the VAC is paid by the PayPal system, and makes reference to new regulation 5.41B, which was inserted by Item 16 of the Regulation.

The purpose of Note 2 is to act as a signpost to new regulation 5.41B, which provides for a PayPal surcharge.

Item 11 – Subregulation 2.12JA(2) (note)

This item repeals the note at the end of subregulation 2.12JA(2) of the Migration Regulations.

This is a technical amendment because Note 1 added by Item 10 of the Regulation contains the same information as this note. This note is now redundant.

Item 12 – At the end of regulation 2.12JA

This item adds new subregulation 2.12JA(4) at the end of regulation 2.12JA of the Migration Regulations.

The purpose of this amendment is to set out the time when payment of a VAC is taken to be received when payment is made using the PayPal payment method.

The effect of the amendment is that a payment is not taken to be received untilthe payment has been confirmed by the operator of the PayPal system.

Item 13 – At the end of paragraph 2.12K(b)

This item adds new subparagraph 2.12K(b)(v) at the end of paragraph 2.12K(b) of the Migration Regulations.

The purpose of this amendment is to specify who pays the amount of payments made using the PayPal payment method.

The effect of the amendment is that the person who pays the amount is the person whose PayPal account was used for the payment.

Item 14 – At the end of subregulation 2.12N(3)

This item adds new paragraph 2.12N(3)(c) at the end of subregulation 2.12N(3) of the Migration Regulations.

The purpose of this amendment is to clarify that PayPal can be used as a payment option for priority consideration of visa applications, and to provide that fees paid using the PayPal system must be made in accordance with instructions given to the applicant as part of making the request.

The effect of this amendment is that applicants who pay for fees using the PayPal system must accord with the instructions given as part of making the request.

Item 15 – Subregulation 2.12N(3) (note)

This item repeals the note at the end of subregulation 2.12N(3) of the Migration Regulations, and substitutes it with two notes.

This is a technical amendment to improve readability following the insertion of Note 2 addressing the PayPal surcharge.

Note 1 provides the same information as the repealed note, specifically that a credit card surcharge is payable if the fee, or part of the fee is paid by credit card, and makes reference to regulation 5.41A of the Migration Regulations.

Note 2 provides that a PayPal surcharge is payable if the fee, or part of the fee is paid by the PayPal system, and makes reference to new regulation 5.41B inserted by Item 16 of the Regulation.

The purpose of Note 2 is to act as a signpost to new regulation 5.41B, which provides for a PayPal surcharge.

Item 16 – At the end of Division 5.7 of Part 5

This item adds new regulation 5.41B at the end of Division 5.7 of Part 5 of the Migration Regulations.

The purpose of this amendment is to require a person to be liable to pay a PayPal surcharge for the processing of a PayPal transaction for a fee or charge of a kind specified by the Minister in a legislative instrument. The amendment also provides the Minister with the power to waive or refund the payment of the PayPal surcharge in circumstances specified by the Minister in a legislative instrument.

The effect of this amendment is that applicants who use the PayPal payment method to pay for fees of a kind specified by the Minister will be liable to pay a PayPal surcharge of 1% of the amount of the payment, at the time the payment is made. The applicant may be entitled to a waiver or refund of the PayPal surcharge if their circumstance is specified by the Minister in a legislative instrument.

Schedule 3 – Credit card surcharge

Australian Citizenship Regulations 2007

Item 1 – Subparagraph 12A(1)(b)(i)

This item omits the "1.08%" credit card surcharge amount for payments made by the Visa or MasterCard credit card, and substitutes a new reduced credit card surcharge amount of "0.98%" in subparagraph 12A(1)(b)(i) of the Citizenship Regulations.

The purpose of this amendment is to update the credit card surcharge amount to enable the Department to recover the cost of credit card merchant fees. The calculation of the surcharge amount is based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia, and is consistent with the cost recovery guidelines issued by the Department of Finance.

The effect of this amendment is that applicants who pay for citizenship fees using the Visa or MasterCard credit card payment option will be charged the revised credit card surcharge amount of 0.98%.

Item 2 – Subparagraph 12A(1)(b)(ii)

This item omits the "1.99%" credit card surcharge amount for payments made by the American Express or Japan Credit Card Bureau (JCB) credit card, and substitutes a new reduced credit card surcharge amount of "1.4%" in subparagraph 12A(1)(b)(ii) of the Citizenship Regulations.

The purpose of this amendment is to update the credit card surcharge amount to enable the Department to recover the cost of credit card merchant fees. The calculation of the surcharge amount is based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia, and is consistent with the cost recovery guidelines issued by the Department of Finance.

The effect of this amendment is that applicants who pay for citizenship fees using the American Express or JCB credit card payment option will be charged the revised credit card surcharge amount of 1.4%.

Item 3 – Subparagraph 12A(1)(b)(iii)

This item omits the "2.91%" credit card surcharge amount for payments made by the Diners Club International credit card, and substitutes a new reduced credit card surcharge amount of "1.99%" in subparagraph 12A(1)(b)(iii) of the Citizenship Regulation.

The purpose of this amendment is to update the credit card surcharge amount to enable the Department to recover the cost of credit card merchant fees. The calculation of the surcharge amount is based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia, and is consistent with the cost recovery guidelines issued by the Department of Finance.

The effect of this amendment is that applicants who pay for citizenship fees using the Diners Club International credit card payment option will be charged the revised credit card surcharge amount of 1.99%.

Migration Regulations 1994

Item 4 – Paragraph 5.41A(2)(a)

This item omits the "1.08%" credit card surcharge amount for payments made by the Visa or MasterCard credit card, and substitutes a reduced new credit card surcharge amount of "0.98%" in paragraph 5.41A(2)(a) of the Migration Regulations.

The purpose of this amendment is to update the credit card surcharge amount to enable the Department to recover the cost of credit card merchant fees. The calculation of the surcharge amount is based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia, and is consistent with the cost recovery guidelines issued by the Department of Finance.

The effect of this amendment is that applicants who pay for migration fees and charges using the Visa or MasterCard credit card payment option will be charged the revised credit card surcharge amount of 0.98%.

Item 5 – Paragraph 5.41A(2)(b)

This item omits the "1.99%" credit card surcharge amount for payments made by the American Express or JCB credit card, and substitutesa new reduced credit card surcharge amount of "1.4%" in paragraph 5.41A(2)(b) of the Migration Regulations.

The purpose of this amendment is to update the credit card surcharge amount to enable the Department to recover the cost of credit card merchant fees. The calculation of the surcharge amount is based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia, and is consistent with the cost recovery guidelines issued by the Department of Finance.

The effect of this amendment is that applicants who pay for migration fees and charges using the American Express or JCB credit card payment option will be charged the revised credit card surcharge amount of 1.4%.

Item 6 – Paragraph 5.41A(2)(c)

This item omits the "2.91%" credit card surcharge amount for payments made by the Diners Club International credit card, and substitutes a new reduced credit card surcharge amount of "1.99%" in paragraph 5.41A(2)(c) of the Migration Regulations.

The purpose of this amendment is to update the credit card surcharge amount to enable the Department to recover the cost of credit card merchant fees. The calculation of the surcharge amount is based on the reasonable cost of acceptance methodology, which is defined and endorsed by the Reserve Bank of Australia, and is consistent with the cost recovery guidelines issued by the Department of Finance.

The effect of this amendment is that applicants who pay for migration fees and charges using the Diners Club International credit card payment option will be charged the revised credit card surcharge amount of 1.99%.

Schedule 4 – Bridging visas for children born in migration zone to unauthorised maritime arrivals

Migration Regulations 1994

Item 1 – After subregulation 2.20(11)

This item inserts new subregulation 2.20(11A) after subregulation 2.20(11) of the Migration Regulations.

Subsection 72(1) of the Migration Act provides that an ***eligible non-citizen*** means a non-citizen who:

- has been immigration cleared; or

- is in a prescribed class of persons; or
- the Minister has determined to be an eligible non-citizen.

Regulation 2.20 provides for the prescribed classes of persons who are eligible non-citizens.

New subregulation 2.20(11A) provides for a person to be an eligible non-citizen if:

- the non-citizen is an unauthorised maritime arrival because of subsection 5AA(1A) of the Migration Act (which is about a non-citizen born in the migration zone with a parent who is at the time of the birth an unauthorised maritime arrival because of subsection 5AA(1) of the Act); and
- a parent of the non-citizen is or was an eligible non-citizen.

Note 1 and Note 2 under subregulation 2.20(11A) explain the operation of subregulation 2.20(11A) on a non-citizen born before, on or after the commencement date.

Subsection 5AA(1A) provides that a person is an ***unauthorised maritime arrival*** if:

- the person is born in the migration zone; and
- a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection 5AA(1) (no matter where that parent is at the time of the birth); and
- the person is not an Australian citizen at the time of birth.

Subsection 5AA(1) provides for the requirements of becoming an ***unauthorised maritime arrival***.

The effect of this amendment is to introduce a new class of eligible non-citizens. This amendment ensures that a person born in the migration zone to an unauthorised maritime arrival parent becomes an eligible non-citizen if a parent is or was an eligible non-citizen.

The purpose of this amendment is to ensure that the non-citizens described in subregulation 2.20(11A) could be eligible for the grant of a bridging visa, specifically a Subclass 050 (Bridging (General)) visa. Section 73 of the Migration Act provides for a person to be eligible for the grant of a bridging visa if they are an eligible non-citizen and satisfy the relevant eligibility criteria.

This amendment is beneficial to the affected non-citizens because it allows people who would not be an eligible non-citizen to obtain this status. In particular, this amendment assists children born to an unauthorised maritime arrival parent(s) to be granted a Subclass 050 (Bridging (General)) visa.

By not imposing a time limit on when the parent is an eligible non-citizen, or whether the parent is still an eligible non-citizen at the time of the person's birth, the provision is intended to be broad in its coverage. The intended outcome is for a person born to an unauthorised maritime arrival parent to 'inherit' the eligible non-citizen status as long as the parent is, at one time, an eligible non-citizen.

It is intended to apply to non-citizens born before, on or after the commencement date, as explained in Note 1 and Note 2 under subregulation 2.20(11A).

Schedule 5 – Technical amendments

Migration Regulations 1994

Item 1 – Regulation 1.03 (definition of *approved appointment*)

This item repeals the definition of "approved appointment" in regulation 1.03 of the Migration Regulations.

The definition refers to subregulation 5.19(1B) of the Migration Regulations which was repealed by Item 41 of Schedule 1 to the *Migration Amendment Regulation 2012 (No. 2)* on 1 July 2012. Although the transitional reference to "approved appointment" in subclause 101(3) of Schedule 13 of the Migration Regulations is a reference to the term as used before the 1 July 2012 amendments, there is no requirement for the term to be defined in the current regulations.

The purpose and effect of this amendment is to repeal the redundant reference to "approved appointment".

Item 2 – Regulation 1.03 (definition of *CNI number*)

This item omits "CrimTrac" and substitutes "the Australian Crime Commission" in the definition of CNI number in regulation 1.03. This is a technical amendment to reflect the merger of CrimTrac and the Australian Crime Commission on 1 July 2016. CrimTrac ceased to exist as a separate entity on that date.

Item 3 – Regulation 1.03 (definition of *CrimTrac*)

This item repeals the definition of CrimTrac from regulation 1.03. CrimTrac ceased to exist as a separate entity on 1 July 2016 when it merged with the Australian Crime Commission. References to CrimTrac in the Migration Regulations have been replaced by references to the Australian Crime Commission (Items 2, 17 and 18 of this Schedule). Accordingly, a definition of CrimTrac is no longer required.

Item 4 – Regulation 1.03 (definition of *working age parent*)

This item repeals the definition of "working age parent" and Notes 1 and 2 under that definition in regulation 1.03 of the Migration Regulations.

The definition of "working aged parent" is no longer used in the Migration Regulations. Subclass 118 (Designated Parent) visa, which made reference to this definition, was repealed by Item 2 of Part 1 of Schedule 1 to the *Migration Amendment (Redundant and Other Provisions) Regulation 2014*. Note 1, which makes reference to the definition of "aged parent" is redundant with the repeal of the definition of "working age parent". Note 2 makes reference to the definition of "foreign country" in section 2B of the *Acts Interpretation Act 1901*, which does not appear in the definition of "working age parent". For this reason, this item also repeals Note 2.

The purpose and effect of this amendment is to repeal the redundant reference to "working age parent" and redundant Notes 1 and 2.

Item 5 – Subparagraph 1.04A(2)(a)(ii)

This item omits the phrase "an Foreign", and substitutes it with "a Foreign" in subparagraph 1.04A(2)(a)(ii) of the Migration Regulations.

This item is a technical amendment, with the purpose and effect of fixing a technical error.

Item 6 – Paragraphs 1.08(b) and (c)

This item repeals paragraphs 1.08(b) and (c) in regulation 1.08 of the Migration Regulations.

Paragraph 1.08(b) makes reference to an "approved appointment" within the meaning of regulation 5.19. This item is consequential to the amendments made in Item 1 of this Schedule which repealed the definition of "approved appointment".

Paragraph 1.08(c) makes reference to applicants for the Business (Temporary) (Class TB) visa. That visa was repealed on 1 August 1996.

The purpose and effect of the amendment is to repeal the redundant references to "approved appointment" and the Business (Temporary) (Class TB) visa.

Item 7 – Subparagraph 1.15AA(1)(b)(iii)

This item amends paragraph 1.15AA(1)(b) of the Migration Regulations to repeal and substitute subparagraph 1.15AA(1)(b)(iii).

The repealed subparagraph referred to the "Impairment Tables" which no longer exists. The *Social Security and Other Legislation Amendment Act 2011* (Social Security Act) moved the tables from Schedule 1B to the *Social Security Act 1991* to instruments determined by the Minister under subsection 26(1) of the Social Security Act. The purpose of this amendment is to update the reference in the subparagraph to the Impairment Tables within the meaning of subsection 23(1) of the Social Security Act, which provides that the Impairment Table means 'the tables determined by an instrument under subsection 26(1)'.

Item 8 – Subregulation 1.15AA(4)

This item repeals subregulation 1.15AA(4) of the Migration Regulations.

The repealed subregulation 1.15AA(4) provides for the definition of "Impairment Tables" to mean Tables for the Assessment of Work-related Impairment for Disability Support Pension in Schedule 1B to the Social Security Act. The purpose of this amendment is to remove this definition because "Impairment Tables" is only referenced once in the Migration Regulations (under paragraph 1.15AA(1)(b)(iii)), which already includes the information expressed in this repealed definition, following the amendments made in Item 7 of this Schedule.

Item 9 – Subparagraphs 2.06AAB(2)(a)(i) and (ii)

This item omits the term "subclause", and substitute it with "subitem" in subparagraphs 2.06AAB(2)(a)(i) and (ii) of the Migration Regulations.

The subparagraphs wrongly refer to "subclause 1404(4) of Schedule 1" instead of "subitem 1404(4) of Schedule 1". This item is a technical amendment, with the purpose and effect of fixing the technical error.

Item 10 – Regulation 2.12A

This item repeals regulation 2.12A of Division 2.2 of the Migration Regulations.

Regulation 2.12A provides for the Memorandum of Understanding (MoU) between the Ministry of Ethnic Affairs of Australia (now the Department of Immigration and Border Protection) and the Ministry of Civil Affairs of the People's Republic of China, by setting out the safe third countries and prescribed connection. The MoU ceased to have effect on 14 August 2013, by operation of subsection 91D(4) of the Migration Act.

The purpose and effect of the amendment is to repeal the redundant reference to the MoU. This item is also consequential to Item 30 which repeals Schedule 11 to the Migration Regulations, which sets out the MoU.

Item 11 – Subregulation 2.16(2D)

This item omits the phrase "subregulations (2) to (2C)", and substitutes it with "subregulations (2) to (2B)" in subregulation 2.16(2D) of the Migration Regulations.

Subregulation 2.16(2C) was repealed by Item 4 of Schedule 1 to the *Migration Legislation Amendment (2016 Measures No. 2) Regulation 2016* on 1 July 2016. In effect, the reference to subregulation 2.16(2C) is redundant.

The purpose and effect of the amendment is to omit the redundant reference to subregulation 2.16(2C).

Item 12 – Subparagraph 2.55(1)(b)(i)

This item omits the phrase "501BA, or", and substitutes it with "501BA or" in subparagraph 2.55(1)(b)(i) of the Migration Regulations.

This item is a technical amendment, with the purpose and effect of removing the unnecessary comma.

Item 13 – Paragraphs 2.55(3)(d), (3A)(d) and (3A)(f)

This item omits the term "e-mail" (wherever occurring), and substitutes it with "email" in paragraphs 2.55(3)(d), (3A)(d) and (3A)(f) of the Migration Regulations.

This item is a technical amendment, with the purpose and effect of maintaining the consistency of the term "email" throughout the Migration Regulations, which is also consistent with the Migration Act.

Item 14 – Subregulation 2.55(8)

This item omits the term “e-mail”, and substitutes it with “email” in paragraph 2.55(8) of the Migration Regulations.

This item is a technical amendment, with the purpose and effect of maintaining the consistency of the term “email” throughout the Migration Regulations, which is also consistent with the Migration Act.

Item 15 – Subregulation 2.85(3)

This item omits the term “accomodation”, and substitutes it with “accommodation” in subregulation 2.85(3) of the Migration Regulations.

This item is a technical amendment, with the purpose and effect of fixing a spelling error.

Item 16 – Subdivision 4.2.2 (heading)

This item repeals the heading of Subdivision 4.2.2, which makes reference to Tribunal members, in Division 4.2 of Part 4 of the Migration Regulations.

This item is a technical amendment, with the purpose and effect of removing an unnecessary subdivision heading.

Item 17 – Regulation 5.34F (heading)

This item repeals and substitutes the heading to regulation 5.34F in Division 5.6 of Part 5 of the Migration Regulations.

The new heading is ‘Disclosure of information to police and Australian Crime Commission’.
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The reference in the previous heading to CrimTrac has been replaced by a reference to the Australian Crime Commission. This is a technical amendment to reflect the merger of CrimTrac and the Australian Crime Commission on 1 July 2016. CrimTrac ceased to exist as a separate entity on that date.

Item 18 – Paragraph 5.34F(2)(c)

This item repeals and substitutes paragraph 5.34F(2)(c) in the Migration Regulations. The reference in the previous paragraph to CrimTrac has been replaced by a reference to the Australian Crime Commission. This amendment is consequential to Item 17 in this Schedule.

Item 19 – Subitem 1404(3) of Schedule 1 (note 2)

This item omits the phrase “paragraph 1403(3)(f))”, and substitutes it with “paragraph 1403(3)(f)” in note 2 in subitem 1404(3) of Schedule 1 to the Migration Regulations.

This item is a technical amendment, with the purpose and effect of removing the unnecessary additional closing parenthesis.

Item 20 – Before Subdivision 040.51 of Schedule 2

This item inserts the heading "040.5 – When visa is in effect" before Subdivision 040.51 of Schedule 2 to the Migration Regulations.

This item is a technical amendment to make reference to a division rather than a subdivision, with the purpose and effect of maintaining consistency within the subclass across other subclasses in the Migration Regulations.

Item 21 – Subdivision 040.51 of Schedule 2 (heading)

This item repeals the heading of Subdivision 040.51 in Division 040 of Schedule 2 to the Migration Regulations.

This item is consequential to the amendments made in Item 20 of the Migration Regulations which inserts the new heading "040.5 – When visa is in effect". This item is a technical amendment, with the purpose and effect of maintaining consistency within the subclass across other subclasses in the Migration Regulations.

Item 22 – Before Subdivision 041.51 of Schedule 2

This item inserts the heading "041.5 – When visa is in effect" before subdivision 041.51 of Division 041 of Schedule 2 to the Migration Regulations.

This item is a technical amendment to make reference to a division rather than a subdivision, with the purpose and effect of maintaining consistency within the subclass across other subclasses in the Migration Regulations.

Item 23 – Subdivision 041.51 of Schedule 2 (heading)

This item repeals the heading of Subdivision 041.51 of Division 041 of Schedule 2 to the Migration Regulations.

This item is consequential to the amendments made in Item 22 of the Migration Regulation which inserts the new heading "041.5 – When visa is in effect". This item is a technical amendment, with the purpose and effect of maintaining consistency within the subclass across other subclasses in the Migration Regulations.

Item 24 – Paragraph 050.212(4A)(b) of Schedule 2

This item omits "Order 16 Rule 12 of the *High Court Rules*", and substitutes it with "rule 21.09.1 of the *High Court Rules 2004*" in paragraph 050.212(4A)(b) of Schedule 2 to the Migration Regulations.

The *High Court Rules 1952* were repealed by the *High Court Rules 2004*. The purpose of this amendment is to update the reference to Order 16 Rule 12 of the *High Court Rules 1952* to the equivalent and current Rule 21.09.1 of the *High Court Rules 2004*.

Item 25 – Subparagraph 050.511(b)(vii) of Schedule 2

This item omits the first occurring term "or" in subparagraph 050.511(b)(vii) of Schedule 2 to the Migration Regulations.

This item is a technical amendment, with the purpose and effect of removing the unnecessary first occurring term "or" which occurs twice.

Item 26 – Division 151.1 of Schedule 2 (heading)

This item repeals the heading, and substitutes it with the following in Division 151.1 of Schedule 2 to the Migration Regulations:

"151.1 – Interpretation

151.111"

This item is a technical amendment to maintain the consistency of the headings with the other subclasses of the Migration Regulations.

Item 27 – Clause 602.313 of Schedule 2

This item omit the phrase "*Financial hardship*" in clause 602.313 of Schedule 2 to the Migration Regulations.

This item is a technical amendment, with the purpose and effect of removing the unnecessary phrase.

Item 28 – Division 802.1 of Schedule 2 (heading)

This item repeals the heading, and substituties it with the following in Division 802.1 of Schedule 2 to the Migration Regulations:

"802.1 – Interpretation

802.111"

This item is a technical amendment to maintain the consistency of the headings with the other subclasses of the Migration Regulations.

Item 29 – Part 6D.7 of Schedule 6D (table item 6D72, column headed "At the time of invitation to apply for the visa, the applicant had…", paragraph (b))

This omits "qualification" and substitutes it with "qualification," in paragraph (b) of table item 6D72 in Part 6D.7 of Schedule 6D to the Migration Regulations.

This item is a technical amendment, with the purpose of adding a comma after "qualification" to clarify that it is the educational qualification, not the educational institution that must be of a recognised standard. Subregulation 2.26AC(5) of the Migration Regulations makes it clear that this is the intended meaning of table item 6D72.

Item 30 – Schedules 11 and 12

This item repeales Schedules 11 and 12 to the Migration Regulations.

Schedule 11 sets out the MoU between the Ministry of Ethnic Affairs of Australia (now the Department of Immigration and Border Protection) and the Ministry of Civil Affairs of the People's Republic of China. The MoU ceased to have effect on 14 August 2013, by operation of subsection 91D(4) of the Migration Act.

Schedule 12 sets out the Exchange of Letters between the Ambassador to China of the Australian Embassy in Beijing, and the Director-General of the Ministry of Civil Affairs.

The purpose and effect of the amendments is to repeal the redundant MoU and Exchange of Letters.

Schedule 6 – Family violence

Item 1 – After regulation 1.20KB

This item inserts new regulation 1.20KC and 1.20KD after regulation 1.20KB in Division 1.4B of Part 1 of the Regulations.

Division 1.4B provides for limitations on certain sponsorships under Division 1.4 of Part 1 of the Regulations. Division 1.4 provides for the sponsorships of, amongst others, applicants for a Prospective Marriage (Temporary) (Class TO) visa, a Partner (Provisional) (Class UF) visa, and a Partner (Temporary) (Class UK) visa (collectively referred to as 'temporary partner visas').

Regulation 1.20KC – Limitation on approval of sponsorship – prospective marriage and partner visas

The heading for new regulation 1.20KC is 'Limitation on approval of sponsorship – prospective marriage and partner visas'.

New regulation 1.20KC provides for the circumstances under which sponsorship for temporary partner visas, may be approved. In general, new regulation 1.20KC has the effect of enabling the Minister to:

- request the sponsor of the temporary partner visa applicant to provide a police check, on one or more occasions; and
- refuse to approve the sponsorship if the police check is not provided; and
- refuse to approve the sponsorship of each applicant of the temporary partner visa, if the police check shows that the sponsor has a ***significant criminal record*** (as defined in new regulation 1.20KD), in relation to a ***relevant offence*** or relevant offences (as defined in new subregulation 1.20KC(2)).

New regulation 1.20KC also enables the Minister to approve the sponsorship, regardless of the sponsor's criminal record, if the Minister considers it reasonable to do so and having regard to certain matters, without limitation.

The purpose of new regulation 1.20KC is to enable the Minister to refuse to approve the sponsorship where the sponsor's criminal history is of concern. However, by giving the Minister the ability to approve the sponsorship where it is reasonable to do so, new regulation 1.20KC allows for matters to be considered on a case by case basis.

Applications for which visas?

New subregulation 1.20KC(1) provides that this regulation applies in relation to the approval of a sponsorship for one or more applications for any of the following visas:

- a Prospective Marriage (Temporary) (Class TO) visa;
- a Partner (Provisional) (Class UF) visa;
- a Partner (Temporary) (Class UK) visa.

The purpose and effect of this subregulation is to set out the visa sponsorships to which new regulation 1.20KC applies. This regulation is intended to apply to approval of sponsorships for temporary partner visas. As the changes in this Schedule are intended to apply to new visa applications made on or after the commencement date, and given that a person can only be granted a permanent partner visa (i.e. a Partner (Migrant) (Class BC) visa or a Partner (Residence) (Class BS) visa) if they first hold a temporary partner visa, it is sufficient for this regulation to apply to temporary partner visa applications.

New regulation 1.20KC refers to sponsorship for one or more visa applications as this regulation is intended to apply to the approval of sponsorship for applications by both primary and secondary visa applicants.

Relevant offences

New subregulation 1.20KC(2) provides that this regulation applies in relation to an offence (a ***relevant offence***) against a law of the Commonwealth, a State, a Territory or a foreign country, involving any of the matters listed in that subregulation.

Given the diversity of offences in the various jurisdictions, new subregulation 1.20KC(2) is intended to describe the types of offences to which new regulation 1.20KC applies, instead of specifying an offence or offences under particular legislation.

New subregulation 1.20KC(2) is intended to limit the application of new regulation 1.20KC to only those offences indicative of a sponsor's propensity to violence, other abusive behaviours and offences committed against potentially vulnerable people, such as human trafficking, people smuggling and slavery. As such, these particular types of offences were chosen for that specific purpose.

Sponsor has significant criminal record in relation to relevant offences

Subregulation 1.20KC(3)

New subregulation 1.20KC(3) provides that the Minister must refuse to approve the sponsorship of each applicant for the visa if:

- the sponsor has been convicted of a relevant offence or relevant offences; and
- the sponsor has a significant criminal record in relation to the relevant offence or relevant offences (see regulation 1.20KD).

The effect of subregulation 1.20KC(3) is to impose a mandatory requirement on the Minister to refuse to approve the sponsorship if the sponsor has been convicted of one or more of the offences listed in subregulation 1.20KC(2), and has a ***significant criminal record***, as defined in regulation 1.20KD, in relation to that offence or offences.

As a person's sentencing often reflects the seriousness of the crime, it is intended for the sponsorship refusal to occur only when the sponsor is convicted of a relevant offence or relevant offences *and* the sentence reflects that the crime committed is of sufficient seriousness (that is, the sponsor has a significant criminal record).

For the purposes of subregulation 1.20KC(3), the meaning of a significant criminal record is provided for in regulation 1.20KD.

Subregulation 1.20KC(4)

New subregulation 1.20KC(4) provides that despite subregulation 1.20KC(3), the Minister may decide to approve the sponsorship if the Minister considers it reasonable to do so, having regard to matters including the following (without limitation):

- the length of time since the sponsor completed the sentence (or sentences) for the relevant offence or relevant offences;
- the best interests of the following:
    - any children of the sponsor;
    - any children of the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned;
- the length of the relationship between the sponsor and the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned.

The effect of this subregulation is to enable the Minister to approve the sponsorship despite the application of subregulation 1.20KC(3). In exercising this power to approve, the Minister must consider it reasonable to do so in the circumstances, having regard to at least the matters listed in subregulation 1.20KC(4). The matters in subregulation 1.20KC(4) are selected as they are relevant to determining the implications of approving the sponsorship to the visa applicant.

The list of matters in subregulation 1.20KC(4) are not intended to be exhaustive so to avoid limiting the matters which the Minister can consider and to ensure that all matters relevant to the circumstances can be considered.

The purpose of this subregulation is to allow for matters to be managed appropriately on a case by case basis. By enabling the Minister to approve the sponsorship, despite the requirement to refuse in subregulation 1.20KC(3), the intention is for the sponsorship to be granted where it is reasonable to do so. For example, in cases where the sponsor has completed the sentence for the relevant offence a significant period of time ago and has not reoffended since that time, and is in a long term relationship with the applicant with no signs of concerns, this may weigh in favour of an approval of the sponsorship despite the requirements of subregulation 1.20KC(3).

Police Check

Subregulation 1.20KC(5)

New subregulation 1.20KC(5) provides that to determine whether a sponsor has been convicted of a relevant offence, and whether the sponsor has a significant criminal record in relation to a relevant offence, the Minister may, on one or more occasions, request the sponsor to provide a police check in relation to the sponsor from any, or all, of the following:

- a jurisdiction in Australia specified in the request;
- a foreign country, specified in the request, in which the sponsor has lived for a period, or a total period, of at least 12 months since the latest of the following dates:
    - 10 years before the date of the request;
    - the date the sponsor turned 16.

The effect of subregulation 1.20KC(5) is to enable the Minister to require the sponsor to provide a police check in a jurisdiction in Australia and, if the sponsor has lived in a foreign country for 12 months or more since turning 16 years of age, from the relevant country or countries. However, if the sponsor has last lived in a foreign country more than 10 years prior to the date of the request, then the Minister cannot request a police check for that country.

It is intended for the Minister to request for one or more police checks of the sponsor any time before the temporary partner visa application is decided. This is intended because it may be necessary to ensure that police checks still accurately reflect the sponsor's criminal history at the time of decision.

The purpose of subregulation 1.20KC(5) is to ensure that the Minister has the information required for decision making under subregulation 1.20KC(3).

Subregulation 1.20KC(6)

New subregulation 1.20KC(6) provides that, in addition to subregulation 1.20KC(3), the Minister may refuse to approve the sponsorship of each applicant for the visa if:

- the Minister has requested a police check from the sponsor under subregulation (5); and
- the sponsor does not provide the police check within a reasonable time.

The effect of subregulation 1.20KC(6) is to provide the Minister with another ground to refuse to approve the sponsorship of each applicant for the visa (in addition to subregulation 1.20KC(3)). However, unlike subregulation 1.20KC(3), which requires the Minister to refuse in the circumstances described in that subregulation, subregulation 1.20KC(6) provides the Minister with the discretion to refuse if the requested police check is not provided within a reasonable time.

A 'reasonable time' for a particular matter will be determined on a case by case basis.

The intention is to enable the Minister to approve the sponsorship in circumstances where the sponsor cannot provide the police check.

Regulation 1.20KD – Prospective marriage and partner visas – definition of *significant criminal record*

New regulation 1.20KD provides for the meaning of ***significant criminal record*** for the purposes of regulation 1.20KC.

This term is created specifically for the purposes of regulation 1.20KC and is intended to apply in relation to the relevant offence or relevant offences listed in subregulation 1.20KC(2). Whilst the meaning of this term somewhat mirrors the meaning of substantial

criminal record in section 501 of the Migration Act, it is a distinct term intended to apply only in the context of regulation 1.20KC.

Subregulation 1.20KD(1)

New subregulation 1.20KD(1) provides that, for the purposes of subregulation 1.20KC, a sponsor has a significant criminal record in relation to a relevant offence or relevant offences if, for that offence or those offences:

- the sponsor has been sentenced to death; or
- the sponsor has been sentenced to imprisonment for life; or
- the sponsor has been sentenced to a term of imprisonment of 12 months or more; or
- the sponsor has been sentenced to 2 or more terms of imprisonment where the total of those terms is 12 months or more.

The effect of subregulation 1.20KD(1) is to provide for the meaning of a significant criminal record. Under this provision, a sponsor will have a significant criminal record if they have been given a sentence described in this subregulation, and that sentence relates to an offence covered by subregulation 1.20KC(2). If the sponsor does have a significant criminal record, then the Minister will be able to refuse to approve the sponsorship under subregulation 1.20KC(3).

These sentences have been chosen because the length of the sentence informs the seriousness of the offence, and it is intended for the Minister to refuse to approve the sponsorship where the crime committed is of sufficient seriousness. In addition, in relation to sponsors with aggregated sentences of 12 months or more, the intention is to ensure that the Minister can refuse to approve the sponsorship where the sponsor is a repeat or serial offender who may have been sentenced to a series of lesser terms of imprisonment for multiple offences (of the kind in subregulation 1.20KC(2)) at the lower end of the scale, but which cumulatively add up to a period of 12 months or more.

Subregulations 1.20KD(2) – (5) provide the calculation methods for determining the term of the imprisonment for the purposes of regulation 1.20KD.

Concurrent sentences

Subregulation 1.20KD(2)

New subregulation 1.20KD(2) provides that, for the purposes of subregulation 1.20KD(1), if a sponsor has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.

An example is provided under subregulation 1.20KD(2). The example provides that a sponsor is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of subregulation 1.20KD(1), the total of those terms is 6 months.

The purpose and effect of this amendment is to ensure that each term of imprisonment counts toward the total 12 months imprisonment irrespective of how the sentences are to be served (whether consecutively or concurrently).

Periodic detention

Subregulation 1.20KD(3)

New subregulation 1.20KD(3) provides that, for the purposes of subregulation 1.20KD(1), if a sponsor has been sentenced to periodic detention, the sponsor's term of imprisonment is taken to be equal to the number of days the sponsor is required under that sentence to spend in detention.

The purpose and effect of this amendment is to ensure that the terms of periodic detention count towards the total of 12 months imprisonment.

Residential schemes or programs

Subregulation 1.20KD(4)

New subregulation 1.20KD(4) provides that, for the purposes of subregulation 1.20KD(1), if a sponsor has been convicted of a relevant offence and the court orders the sponsor to participate in:

- a residential drug rehabilitation scheme; or
- a residential program for the mentally ill;

the sponsor is taken to have been sentenced to a term of imprisonment equal to the number of days the sponsor is required to participate in the scheme or program.

The purpose and effect of this amendment is to ensure that the participation in the residential schemes or programs count towards the total of 12 months imprisonment.

Pardons etc.

Subregulation 1.20KD(5)

New subregulation 1.20KD(5) provides that, for the purposes of subregulation 1.20KD(1), a sentence imposed on a sponsor for a relevant offence, or the conviction of a sponsor for a relevant offence, is to be disregarded if:

- the conviction concerned has been quashed or otherwise nullified; or
- both:
    - the sponsor has been pardoned in relation to the conviction concerned; and
    - the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.

The purpose and effect of subregulation 1.20KD(5) is to ensure that a person's conviction (and related sentence) is to be disregarded for the purposes of determining whether they have a significant criminal record if the conviction has been quashed or otherwise nullified, or they have been pardoned and the effect of the pardon is that the person is taken never to have been convicted of the offence.

Items 2 and 5 – Clause 300.222 of Schedule 2 and Clause 309.222 of Schedule 2

These items insert "(1)" before "The sponsorship" in clauses 300.222 and 309.222 of Schedule 2 to the Migration Regulations.

These are technical amendments to reflect the change to clauses 300.222 and 309.222 from one clause into three subclauses. These amendments are consequential to the amendments made by Items 4 and 7.

Items 3 and 6 – Clause 300.222 of Schedule 2 (note) and Clause 309.222 of Schedule 2 (note)

These items omit the words 'and 1.20KB' and substitute the words '1.20KB and 1.20KC' in the notes under clauses 300.222 and 309.222 of Schedule 2 to the Migration Regulations.

These amendments are consequential to the amendments made by Item 1.

Items 4 and 7 – At the end of clause 300.222 of Schedule 2 and At the end of clause 309.222 of Schedule 2

These items add subclauses 300.222(2) and (3) into clause 300.222 of Schedule 2 to the Migration Regulations, and subclauses 309.222(2) and (3) into clause 309.222 of Schedule 2 to the Migration Regulations.

The amendments to Subclass 300 (Prospective Marriage) visa ('subclass 300 visa') and Subclass 309 (Partner (Provisional)) visa ('subclass 309 visa') are largely the same, except for the term used to reference the ***sponsor*** (as provided for in subregulation 1.20(1)).

In the subclass 300 visa, the term ***prospective spouse*** is used to reference the sponsor. Clause 300.111 provides that ***prospective spouse*** means the Australian citizen, Australian Permanent resident or eligible New Zealand citizen referred to in clause 300.211.

Clause 300.211 provides that the applicant intends to marry a person who is an Australian citizen, permanent resident or an eligible New Zealand citizen.

In the subclass 309 visa, the term sponsor is used to refer to the person sponsoring the applicant.

Subclauses 300.222(2) and 309.222(2)

New subclauses 300.222(2) and 309.222(2) provide that the prospective spouse (in the case of the subclass 300 visa application), or the sponsor (in the case of the subclass 309 visa application), has consented to the disclosure by the Department to the visa applicant(s) of the conviction of the prospective spouse or sponsor for a relevant offence or offences (within the meaning of subregulation 1.20KC(2)).

The effect of these amendments is that, as a criterion for the relevant visa grant, the sponsor or prospective spouse must provide consent to the disclosure by the Department to the visa applicant(s) of their conviction(s) for a relevant offence or relevant offences (within the meaning of subregulation 1.20KC(2)). If the prospective spouse or sponsor does not provide the consent, then the applicant would not meet this criterion for the visa grant.

By requiring the sponsor to give consent to disclose, the intention of this criterion is to allow the Department to disclose the sponsor's convictions to the visa applicant(s). The disclosure will be limited to only the conviction(s) of the prospective spouse or sponsor for the relevant

offence or relevant offences described in subregulation 1.20KC(2) (as described in Item 1 above). In addition, the Department can only disclose the relevant information to the visa applicant(s), in accordance with the sponsor's consent.

It is intended for the Department to be allowed to disclose the relevant information regardless of whether the prospective spouse or sponsor has a significant criminal record for the purposes of regulation 1.20KC. This element reflects that, regardless of the length of the sentence served, these offences may be indicative of a history of family violence or other concerning behaviour, and that this information should be available to the applicant to consider before progressing with the application.

By equipping visa applicants with the relevant information about the prospective spouse or sponsor, the applicants can make an informed decision about whether they wish to progress the visa application with the prospective spouse or sponsor, in consideration of the potential risks that may be posed to their personal circumstances.

The Note under subclauses 300.222(2) and 309.222(2)

The Note under subclauses 300.222(2) and 309.222(2) provides that the prospective spouse, or the sponsor, may be asked to consent to such disclosure on the approved form required to be completed by them in relation to the visa application.

Pursuant to subregulation 1.20(3), the prospective spouse or sponsor must enter into the sponsorship by completing the relevant approved form and giving it to the Minister. The Notes under new subclauses 300.222(2) and 309.222(2) refer to this process as a means for the prospective spouse or sponsor to give consent to information disclosure by the Department.

Subclauses 300.222(3) and 309.222(3)

New subclauses 300.222(3) and 309.222(3) provide that for the purposes of subclauses 300.222(2) and 309.222(2), the conviction of the sponsor or prospective spouse for a relevant offence is to be disregarded if:

- the conviction has been quashed or otherwise nullified; or
- both:
    - the prospective spouse or sponsor has been pardoned in relation to the conviction; and
    - the effect of that pardon is that the prospective spouse or sponsor is taken never to have been convicted of the offence.

The effect of these amendments is that if the prospective spouse or sponsor has previously been pardoned of a conviction and, as a result, is taken never to have been convicted of the offence, or a conviction has been quashed or otherwise nullified, then the sponsor is not required to consent to the Department disclosing those conviction(s) under subclauses 300.222(2) and 309.222(2).

These amendments are intended to align with the effects of new subregulation 1.20KD(5), which has the effect of requiring any sentence(s) imposed on the sponsor to be disregarded if the conviction had been quashed or otherwise nullified, or if the sponsor had been pardoned. If a sponsor's conviction has, on whatever grounds, been disregarded for the purposes of a

significant criminal record, then it is the intention that such conviction is also disregarded for the purposes of the consent to disclose.

Item 8 – Subclause 820.221(4) of Schedule 2

This item repeals subclause 820.221(4) and substitutes it with subclauses 820.221(4) and (5) of Schedule 2 to the Migration Regulations.

Subclause 820.221(4)

New subclause 820.221(4) provides that if paragraphs 820.211(2)(c), (5)(f) or (6)(c) require the applicant to be sponsored:

- the sponsorship has been approved by the Minister and is still in force; and
- the sponsor has consented to the disclosure by the Department to the applicant of the conviction of the sponsor for a relevant offence or offences (within the meaning of subregulation 1.20KC(2)).

The effect of the first dot point above is identical to previous subclause 820.221(4).

Paragraphs 820.211(2)(c), (5)(f) and (6)(c) provide for applicants who are sponsored by their spouse (if the spouse has turned 18) or by a parent or guardian of the spouse (if the spouse has not turned 18).

The effect of this provision is that, as a criterion for the visa grant, the sponsor for applicants in the circumstances described in paragraphs 820.211(2)(c), (5)(f) and (6)(c) must consent to the disclosure by the Department to the visa applicant(s) of their conviction(s) for a relevant offence or relevant offences (within the meaning of subregulation 1.20KC(2)). If the sponsor has not provided the consent, then the applicant would not meet this criterion. The chapeau of this provision makes clear that this provision only applies to applicants who are required to be sponsored by paragraphs 820.211(2)(c), (5)(f) and (6)(c).

This provision is not intended to capture applicants in other circumstances because they relate to applicants with sponsors who are deceased, or to situations involving family violence, or members of a special military agreement between Australia and other relevant countries.

By requiring the sponsor to give consent to disclose, the intention of this criterion is to allow the Department to disclose the sponsor's convictions to the visa applicant. The disclosure will be limited to only the conviction(s) of the sponsor or prospective spouse for the relevant offence or relevant offences described in subregulation 1.20KC(2) (as described in Item 1 above). In addition, the Department can only disclose the relevant information to the visa applicant(s), in accordance with the sponsor's consent.

It is intended for the Department to be allowed to disclose the relevant information regardless of whether the sponsor or prospective spouse has a significant criminal record for the purposes of regulation 1.20KC. This element reflects that, regardless of the length of the sentence served, these offences may be indicative of a history of family violence or other concerning behaviour, and that this information should be available to the applicant to consider before progressing with the application.

By equipping visa applicants with the relevant information about the sponsor, the applicants can make an informed decision about whether they wish to progress the visa application with

the sponsor, in consideration of the potential risks that may be posed to their personal circumstances.

The Notes under subclause 820.221(4)

Note 1 under subclause 820.221(4) provides that regulations 1.20J, 1.20KA, 1.20KB and 1.20KC limit the Minister's discretion to approve sponsorships.

This Note acts as a signpost to other relevant provisions in the Migration Regulations which limit the Minister's discretion to approve sponsorships.

Note 2 under subclause 820.221(4) provides that the sponsor may be asked to consent to the disclosure mentioned in paragraph (b) on the approved form required to be completed by the sponsor in relation to the visa application.

Pursuant to subregulation 1.20(3), the sponsor must enter into the sponsorship by completing the relevant approved form and giving it to the Minister. The Note under new subclause 820.221(4) refers to this process as a means for the sponsor to give consent to information disclosure by the Department.

Subclause 820.221(5)

New subclause 820.221(5) provides that, for the purposes of subclause 820.221(4), the conviction of the sponsor for a relevant offence is to be disregarded if:

- the conviction has been quashed or otherwise nullified; or
- both:
    - the sponsor has been pardoned in relation to the conviction; and
    - the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.

The effect of these amendments is that if the sponsor has previously been pardoned of a conviction and, as a result, is taken never to have been convicted of the offence, or a conviction has been quashed or otherwise nullified, then the conviction is not to be disclosed by the Department under subclause 820.221(5).

These amendments are intended to align with the effects of new subregulation 1.20KD(5), which has the effect of requiring any sentence(s) imposed on the sponsor to be disregarded if the conviction had been quashed or otherwise nullified, or if the sponsor had been pardoned. If a sponsor's conviction has, on whatever grounds, been disregarded for the purposes of a significant criminal record, then it is the intention that such conviction is also disregarded for the purposes of the consent to disclose.

Item 9 – Clause 820.221A of Schedule 2 (note)

This item omits "and 1.20KB" and substitutes it with ", 1.20KB and 1.20KC" from the note under clause 820.221A of Schedule 2 to the Migration Regulations.

This amendment is consequential to the amendments made by Item 1.

Schedule 7 – Application and transitional provisions

Australian Citizenship Regulations 2007

Item 1 – In the appropriate position in Part 4

This item inserts regulation 31 in the appropriate position in Part 4 of the Citizenship Regulations.

The heading of regulation 31 is 'Amendments made by the *Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016*'.

Subregulations 31(1) and (2) relevantly provide that the amendments of the Citizenship Regulations made by Schedule 2 and 3 , to the apply in relation to applications made under a provision of the Citizenship Act on or after 10 September 2016.

The purpose of this amendment is to make it clear to whom the amendments made by Schedules 2 and 3 to the Regulation apply.

Migration Regulations 1994

Item 2 – In the appropriate position in Schedule 13

This item inserts Part 55 in the appropriate position Schedule 13 to the Migration Regulations.

The heading of Part 55 is 'Amendments made by the Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016'.

Clause 5501 is titled 'Operation of Schedule 1'. It provides that the amendments of the Migration Regulations made by Schedule 1 to the Regulation apply to the making of applications for Return (Residence) (Class BB) visas on or after 10 September 2016.

Clause 5502 is titled 'Operation of Schedules 2 and 3'. It provides that the amendments of the Migration Regulations made by Schedules 2 and 3 to the Regulation apply in relation to payment of fees and charges on or after 10 September 2016.

Clause 5503 is titled 'Operation of Schedule 4'. It provides that the amendment of the Migration Regulations made by Schedule 4 to the Regulation applies to non-citizens born before, on or after 10 September 2016.

Clause 5504 is titled 'Operation of Schedule 6'. It provides that the amendments of the Migration Regulations made by Schedule 6 to the Regulation apply in relation to an application for any of the following visas made on or after 18 November 2016:

- a Prospective Marriage (Temporary) (Class TO) visa;
- a Partner (Provisional) (Class UF) visa;
- a Partner (Temporary) (Class UK) visa.

The Note under clause 5504 provides that Schedule 6 to the Regulation commences on 18 November 2016.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.