EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Act 1958

Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021

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

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act. In addition, regulations can be made pursuant to, or for the purposes of, the provisions listed at Attachment A.

The *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021* (the Humanitarian Response Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to facilitate applications for permanent residence by persons evacuated to Australia for temporary safe haven following the crisis in Afghanistan in August 2021. An application for permanent residence will be possible, pursuant to these amendments, in circumstances where the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs exercises his power under section 91L of the Migration Act to allow the application to be made. The Minister has final responsibility for determining whether a holder of a temporary safe haven visa can apply for another visa in Australia.

In particular, the Humanitarian Response Regulations amend provisions relating to application for, and grant of, a permanent visa known as the Subclass 201 (In-country Special Humanitarian) visa, so that the visa can be applied for by, and granted to, holders of Subclass 449 (Humanitarian Stay (Temporary)) visas who are in a class of persons specified by the Minister in a legislative instrument.

The Subclass 201 visa is one of five visa subclasses within the visa class known as the Refugee and Humanitarian (Class XB) visa. These visas are used to implement Australia's offshore humanitarian visa program. In normal circumstances, the visas can only be applied for by, and granted to, applicants who are outside Australia. Given the special circumstances arising from the crisis in Afghanistan, and the desirability of minimising the trauma and uncertainty of persons evacuated to Australia, the Government is creating a limited exception to the requirement for visa applicants to be offshore to access the Subclass 201 visa. This amendment will facilitate an early resolution of visa status and allow eligible individuals to begin building a life as permanent residents of Australia.

The Subclass 201 (In-country Special Humanitarian) visa was selected as the appropriate subclass for this purpose as it is the visa subclass that would have been granted if the applicants were able to remain in Afghanistan. Applicants will not have to meet the requirement to be at ongoing risk of harm in Afghanistan as that issue has been overtaken by the safe haven

provided in Australia. However, applicants will need to meet standard public interest criteria relating to health and character, and also criteria requiring that permanent settlement in Australia is appropriate for the individual and is not contrary to the interests of Australia. Applicants will not be able to include family members in an application unless the family member also holds a Subclass 449 (Humanitarian Stay) (Temporary)) visa and is in Australia as a result of being evacuated from Afghanistan. This is a pragmatic measure to allow an early resolution of the status of the individuals evacuated to Australia. Visa processing would be significantly delayed for these individuals if it was necessary to process visa applications by a family group including family members remaining in Afghanistan. There will be close liaison with persons granted Subclass 201 visas about the best approach to achieving family reunion, which is a high priority for the Government.

The concession allowing onshore application for, and grant of, Subclass 201 (In-country Special Humanitarian) visas, will only apply to holders of Subclass 449 (Humanitarian Stay) (Temporary)) visas. This is because the Subclass 449 visa is the temporary visa granted to evacuees from Afghanistan in order to facilitate their lawful entry into Australia for temporary safe haven.

In addition, the concession is limited to holders of Subclass 449 visas who are in a class of persons specified by the Minister in a legislative instrument. The Minister is authorised to make the legislative instrument if he considers that the measure is appropriate to assist persons residing temporarily in Australia as a result of the humanitarian crisis in Afghanistan. The use of a legislative instrument to specify the eligible Subclass 449 holders is appropriate because of the large number of Subclass 449 holders who have arrived in Australia from Afghanistan, and the small number who may continue to arrive, and the need to further consider their circumstances. The flexibility provided by the use of a legislative instrument will assist the Minister and the Department of Home Affairs to manage this significant humanitarian visa caseload.

The legislative instrument will not be subject to disallowance by the Parliament. The authority and discretion provided to the Minister to make a non-disallowable legislative instrument in these circumstances is justifiable having regard to the exceptional circumstances created by the Afghanistan crisis and the need to respond flexibly and urgently to resolve the visa status of the evacuees.

The Humanitarian Response Regulations also include a transitional provision to allow a Refugee and Humanitarian (Class XB) visa applied for outside Australia before the commencement of the regulations to be granted to an applicant who is in Australia and who holds or has held a Subclass 449 visa. This will allow part-processed visa applications, made outside Australia by persons subsequently evacuated to Australia, to be finalised and visas granted to eligible applicants, rather than requiring those persons to make another application in Australia. This is beneficial for the affected applicants.

The matters dealt with in the Humanitarian Response Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at Attachment A. These include, for example, subsection 31(3),

which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations and crises such as occurred in Afghanistan.

The Humanitarian Response Regulations commence on the day after they are registered on the Federal Register of Legislation.

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

Details of the Regulations are set out in Attachment C.

The Department of Home Affairs has consulted broadly through the recently formed Ministerial Advisory Panel (the Panel) and Australian Afghan communities. Topics of consultation have included how best to support the settlement of those who were part of Australia's evacuation mission out of Afghanistan and have since arrived in Australia on Subclass 449 visas. The Panel is led by the Commonwealth Coordinator-General for Migrant Services, Alison Larkins and a leading expert in refugee settlement, Paris Aristotle AO. The panel is supported by Afghan community leaders in Australia, leading refugee advocates and service providers who are recognised for their long-standing experience in refugee settlement and integration issues. A consistent theme from this consultation was the importance of providing a clear pathway to resolve the permanent status of evacuees in Australia and appropriate support throughout the process. While there was extensive consultation on settlement support, there has not been specific stakeholder consultation on the Regulation change given the time constraints involved. However, the amendments are beneficial for this cohort as they directly support the resolution of their permanent status. The Attorney-General's Department was consulted in relation to the amendments. The consultations undertaken are consistent with the requirements of subsection 17(1) of the *Legislation Act 2003*.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments and has advised that a Regulation Impact Statement is not required. The OBPR reference is 44648.

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

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

ATTACHMENT A

AUTHORISING PROVISIONS

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

- subsection 29(1), which provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to and enter Australia; (b) remain in Australia;

- subsection 29(2), which provides that, without limiting subsection 29(1), a visa to travel to, enter and remain in Australia may be one to: (a) travel to and enter Australia during a prescribed or specified period; and (b) if, and only if, the holder travels to and enters during that period, remain in Australia during a prescribed or specified period or indefinitely;

- subsection 29(3), which provides that, without limiting subsection 29(1), a visa to travel to, enter and remain in Australia may be one to: (a) travel to and enter Australia during a prescribed or specified period; and (b) if, and only if, the holder travels to and enters during that period: (i) remain in it during a prescribed or specified period or indefinitely; and (ii) if the holder leaves Australia during a prescribed or specified period, travel to and re-enter it during a prescribed or specified period;

- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;

- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;

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

- paragraph 46(1)(b), which provides that a visa application is valid only if it satisfies the criteria and requirements prescribed in the regulations.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to allow for the onshore application and grant of class XB Humanitarian visas where the visa applicant is within a specified class of persons. This amendment will enable a specified cohort who currently hold a Humanitarian Stay (Temporary)(subclass 449) visa and are in Australia, to apply for, and be granted, In-country Special Humanitarian (subclass 201) visas without the need to be 'In-country.'

On 17 August 2021, in response to the rapidly deteriorating environment in Afghanistan, the Government agreed to use the subclass 449 visa for Afghan nationals who were locally engaged employees of the Australian Government, Afghans with a strong connection to Australia and Afghans who were particularly vulnerable or high profile such that they may come to the attention of the Taliban (the cohort), to facilitate their safe evacuation to Australia as quickly as possible. The use of the subclass 449 visa was part of an urgent and exceptional humanitarian evacuation operation. The subclass 449 visa was used for the cohort because of the rapidly deteriorating security circumstances and the limited window of opportunity for people to be evacuated out of Afghanistan.

Subclass 449 visas were granted to the cohort for a period of three months, to allow for their emergency evacuation and lawful entry into Australia. The cohort now requires a visa pathway to transition to permanent settlement in Australia.

Without the Amendment Regulations, subclass 449 visa holders would be significantly limited in being able to meet the eligibility criteria to apply for a permanent visa pathway to remain in Australia. For those who are eligible and have lodged applications for other family visas, such as Partner (subclass 309 and 100) and Child (subclass 101), these visas allow for the grant of the visa whilst the applicant is in Australia, despite the application having been lodged while the applicant was offshore. The requirements for grant of a class XB Humanitarian visa (including a subclass 201 visa) do not currently allow for lodgement or grant to occur while the applicant is onshore.

Allowing the cohort to apply for a subclass 201 visa onshore will ensure that those who wish to access a permanent Humanitarian visa will have the option to apply for the same type of visa they would have previously been able to apply for, if not for their emergency evacuation.

The Amendment Regulations will provide a permanent visa pathway to those applicants who meet standard public interest criteria relating to health and character, and also criteria requiring

that permanent settlement in Australia is appropriate for the individual and is not contrary to the interests of Australia. Additionally it will support Australia to continue to meet our international humanitarian obligations through our long-standing humanitarian and resettlement program, which is intended to be flexible and available to address crisis situations such as what this cohort experienced in Afghanistan.

Human rights implications

This disallowable legislative instrument engages the following rights:

- The right to non-discrimination in Article 2(1) and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- The right to life in Article 6 of the ICCPR and Article 6 of the *Convention on the Rights of the Child* (CRC)
- The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment in Article 3 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), Article 7 of the ICCPR and Article 37 of the CRC

The right to non-discrimination

Article 2(1) of the 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.*

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

In its General Comment 18, the UN Human Rights Committee stated that:

> *The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

The Amendment Regulations will engage and limit these rights to non-discrimination as they will only apply to a specified cohort in Australia who currently hold a subclass 449 visa and were evacuated urgently out of Afghanistan.. These are Afghan nationals who were locally engaged employees of the Australian Government, those with a strong connection to Australia and other groups of Afghan nationals who were particularly vulnerable or high profile that they may come to the attention of Taliban (for example locally engaged staff of Australian media organisations and humanitarian service providers, female sporting teams, academics who had previously studied in Australia and human rights advocates), whose safe evacuation from Afghanistan to Australia was arranged as quickly as possible.

While these measures will differentiate on the basis of a person's nationality (Afghan nationals) and 'other status' (individuals evacuated from Afghanistan after being granted a subclass 449 visa), to the extent this may be a limitation on the right to non-discrimination, it is reasonable, necessary and proportionate to the legitimate objective of promoting other ICCPR rights, namely the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. It is reasonable and necessary to limit the scope of these measures to the cohort because the unique circumstances leading to the urgent grant of subclass 449 visas to the cohort and their subsequent evacuation to Australia (in effect removing access to a permanent visa pathway that would otherwise have been available) do not apply to other cohorts. Other cohorts requiring Australia's protection have access to apply for and be granted Humanitarian visas offshore or Protection visas onshore.

Additionally, it is necessary and proportionate to limit the scope of these measures to the cohort as it is not feasible to apply them to everyone in Australia on a temporary visa, within the current annual allocation of Refugee and Humanitarian program places. Other measures, such as allowing the cohort to apply for a Protection visa (subclass 866) were considered. However, this approach was not considered appropriate for the cohort as the subclass 866 visa does not allow for the provision of settlement services (which would have been made available were the cohort to remain in Afghanistan and be granted the subclass 201 visa). The circumstances leading to the urgent departure of the cohort from Afghanistan mean that many of its members are particularly vulnerable, and it is considered proportionate and necessary that they be provided with support to settle in Australia and access relevant services. Subclass 866 visa holders have previously arrived in Australia as part of planned migration or on other temporary visas, so are generally considered to be better placed to support themselves and access appropriate services.

Although this measure will provide differential treatment to the cohort and this may limit the right to non-discrimination, any limitation is reasonable, necessary and proportionate in achieving a legitimate objective.

The right to life

Article 6 of the ICCPR and Article 6 of the CRC provide that persons, including children, have an inherent right to life. The Amendment Regulations will promote the right to life by providing an onshore pathway to a permanent Humanitarian visa. These measures are in line with Australia's international protection obligations and ensure that no person in the cohort is required to return to Afghanistan while it continues to be a place where they might be arbitrarily deprived of their life, in order to apply for or be granted a permanent Humanitarian visa.

The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment

Article 3 of the CAT provides that no State Party expel, return ("refouler") or extradite a person to another territory where there are substantial grounds for believing that the person would be subjected to torture. Article 7 of the ICCPR and Article 37 of the CRC provides that no person, including children, shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. The Amendment Regulations promote these rights by providing a pathway to a permanent Humanitarian visa that does not require any person in the cohort to return to Afghanistan while it continues to be a place where they might be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Conclusion

The disallowable legislative instrument is compatible with human rights because it promotes the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. To the extent that the measures limit the right to non-discrimination, any limitation is reasonable, necessary and proportionate in achieving a legitimate objective.

The Hon Alex Hawke MP

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

ATTACHMENT C

Details of the *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021*

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021* (the Regulations).

Section 2 – Commencement

This section provides for the commencement of the instrument.

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

The effect of the table is that the Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation.

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 regulations. 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.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958.*

Section 4 – Schedules

This section provides for how the amendments in the regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – After paragraph 2.21B(1)(c)

This item amends regulation 2.21B of the *Migration Regulations 1994* (the Migration Regulations) to authorise the Minister or his delegates to grant a Bridging A, Bridging C or Bridging E visa to a non-citizen in Australia who has made a valid application for a Refugee and Humanitarian (Class XB) visa pursuant to the amendments outlined below. The key feature of regulation 2.21B is that it allows the bridging visa to be granted without requiring the non-citizen to make an application for the bridging visa. The reason for including applicants for Refugee and Humanitarian (Class XB) visas within the scope of the regulation is to assist the Department of Home Affairs to manage the visa status of persons evacuated to Australia from Afghanistan while they apply for permanent residence in Australia. Those persons have been

granted Subclass 449 (Humanitarian Stay (Temporary)) visas. It is envisaged that they will continue to hold Subclass 449 visas during the time that is taken to process applications for Refugee and Humanitarian (Class XB) visas. However, the Department can maintain their lawful status by the grant of a bridging visa, following a bridging visa application associated with the Class XB application, or without an application under this provision, if this becomes necessary.

Item [2] – At the end of paragraph 1402(3)(b) of Schedule 1
Item [4] – After subitem 1402(3A) of Schedule 1

These items amend the provision, in paragraph 1402(3)(b) of Schedule 1 to the Migration Regulations, requiring applicants for Refugee and Humanitarian (Class XB) visas to be outside Australia when the application is made. The Refugee and Humanitarian (Class XB) visa underpins Australia's offshore humanitarian visa program. It contains five visa subclasses:

- Subclass 200 (Refugee);
- Subclass 201 (In-country Special Humanitarian);
- Subclass 202 (Global Special Humanitarian);
- Subclass 203 (Emergency Rescue); and
- Subclass 204 (Woman at Risk).

Prior to this amendment, these visas could only be applied for by applicants outside Australia. The amendment creates a limited exception to this requirement, to cater for individuals who were evacuated to Australia in response to the crisis in Afghanistan.

The effect of the amendments is that a visa applicant does not have to be outside Australia if, when the application is made, the applicant holds a Subclass 449 (Humanitarian Stay (Temporary)) visa and is in a class of persons specified by the Minister in a legislative instrument (referred to hereafter as "evacuees from Afghanistan").

The Subclass 449 visa is the temporary safe haven visa granted to the evacuees from Afghanistan.

It is intended that the persons who are permitted to apply for the Refugee and Humanitarian (Class XB) visa in Australia will be granted the Subclass 201 (In-Country Special Humanitarian) visa. Relevant amendments to the criteria for the grant of that visa are set out in the items below.

The requirement for the applicant to be in a class of persons specified in a legislative instrument provides flexibility to define the cohort covered by the concession and make adjustments if necessary. This is appropriate given the limited and targeted nature of the concession and the need to further consider the circumstances of the large contingent of evacuees from Afghanistan who have arrived in Australia during recent months.

The power to make the legislative instrument is limited by a requirement for the Minister to be satisfied that the making of the instrument is appropriate to assist persons residing temporarily in Australia as a result of Australia's response to the humanitarian crisis in Afghanistan in 2021. This limitation ensures that the legislative instrument cannot be used for any other cohort. The limitation has been included to strengthen accountability to Parliament, which is appropriate because the legislative instrument will not be disallowable by Parliament (see table item 20 in regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*,

which has the effect that an instrument made under Schedule 1 to the *Migration Regulations 1994* is not subject to disallowance under section 42 of the *Legislation Act 2003*).

Item [3] – Paragraph 1402(3)(c) of Schedule 1

This item amends the provision that allows a family group to make a combined application for permanent residence via the grant of a Refugee and Humanitarian (Class XB) visa. The effect of the amendment is to modify the standard permission for combined applications, so that applications by evacuees from Afghanistan can only be combined with applications by family members who are also evacuees from Afghanistan. That is, the amendment will allow family groups evacuated to Australia to be processed together but family members remaining in Afghanistan will have to make separate applications.

This is a pragmatic measure, to assist early resolution of applications for the permanent visa. The amendment is necessary because it would significantly delay the processing of applications for permanent residence if family members remaining in Afghanistan were included in the applications. All family members who are included in the application must meet health and character criteria before any member of the family, including the primary applicant, can be granted the visa. Because of the current circumstances in Afghanistan it is difficult to predict when the dependents remaining in that country could undergo these mandatory checks. The immediate priority is the processing of applications by the persons who have been evacuated to Australia. Family reunion will be managed as the next step.

The change made by this item will not cause any disadvantage to family members remaining in Afghanistan. Separate applications can be made on their behalf at the appropriate time, and there is no visa application charge.

Item [5] – At the end of subclause 201.211(1) of Schedule 2

This item amends the time-of-application criteria that must be satisfied by a primary applicant for a Subclass 201 (In-country Special Humanitarian) visa. The Subclass 201 visa is a permanent visa. It is one of the five visa subclasses in the Refugee and Humanitarian (Class XB) visa, which is used to implement Australia's offshore humanitarian program. As noted above, Subclass 201 will now also cater for evacuees from Afghanistan.

Clause 201.211 in Schedule 2 to the Migration Regulations sets out criteria that must be satisfied by an applicant at the time the application is made. Prior to this amendment, the position was that, except for cases of family reunion (paragraph 201.211(1)(b) and subclause 201.211(2)), the criteria required the applicant to be subject to persecution in the home country and living in the home country (paragraph 201.211(1)(a)) or at risk of harm for reasons relating to membership of a class of persons specified by the Minister in an instrument in writing (paragraph 201.211(1)(aa) and subclause 201.211(1A)).

This item amends clause 201.211 to create an alternative criterion, to cater for evacuees from Afghanistan. As those individuals are now living safely in Australia, and are no longer at risk of persecution or other harm, the new criterion only requires that, at time of application, the applicant holds a Subclass 449 visa and is in a class of persons specified by the Minister in a legislative instrument.

Item [6] – At the end of clause 201.229 of Schedule 2

This item amends the primary criteria for grant of the Subclass 201 (In-country Special Humanitarian) visa that relate to the health and character of the primary applicant's family members. Clause 201.229 of Schedule 2 provides that an application can only be approved if all members of the applicant's family unit satisfy specified public interest criteria relating to health and character. This requirement extends to members of the family unit who are not applying for the visa (subclause 201.229(2)). If one family member fails to satisfy these criteria, no member of the family can be granted the visa.

The effect of the amendment is that the criterion in subclause 201.229(2) does not apply to an applicant who is an evacuee from Afghanistan. For those applicants, there will be no assessment of the health or character of members of the family unit who are not also applying for the Subclass 201 visa.

This amendment is a pragmatic measure, beneficial to the applicant, acknowledging the difficulty, in the current circumstances, of assessing any family members of evacuees from Afghanistan who remain in Afghanistan. The amendment is complementary to the amendment at item [3] above, which limits combined applications to members of the family who are also evacuees from Afghanistan.

Item [7] – Paragraph 201.311(a) of Schedule 2
Item [8] – Paragraph 201.321(a) of Schedule 2

These items make technical amendments to the secondary criteria for grant of the Subclass 201 (In-country Special Humanitarian) visa. The purpose of the amendments is to ensure that a family member who made a combined application with the primary applicant can be granted the visa if the primary applicant satisfied the new primary criteria for evacuees from Afghanistan.

As noted above at item [3], combined applications are only permitted for family members who are also evacuees from Afghanistan. As such, members of the family unit who make a combined application will be able to satisfy the primary criteria or the secondary criteria.

Item [9] – Clause 201.411 of Schedule 2
Item [10] – At the end of clause 201.411 of Schedule 2

These items amend the requirement for applicants to be outside Australia for the grant of a Subclass 201 (In-country Special Humanitarian) visa. The effect of the amendments is that an exception is created for evacuees from Afghanistan. Those applicants may be in Australia (other than in immigration clearance) or outside Australia at the time of grant. As a practical outcome, it is anticipated that all evacuees from Afghanistan will be in Australia when the Subclass 201 visa is granted.

Item [11] – Clause 201.611 of Schedule 2

This item amends a visa condition requiring first entry to Australia to be made before a date specified by the Minister. The effect of the amendment is that the condition only applies if the applicant is outside Australia when the visa is granted. The amendment is consequential to the items immediately above, allowing evacuees from Afghanistan to be in Australia when the visa is granted.

Item [12] – In the appropriate position in Schedule 13

This item adds **Part 102—Amendments made by the Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021** to Schedule 13 to the Migration Regulations. The purpose of Part 102 is to explain how the amendments made by these Regulations will apply and to make a transitional arrangement.

Clause 10201 – Operation of Schedule 1

Clause 10201 provides that the amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021* apply in relation to an application for a visa made after the commencement of that Schedule. The Regulations commence on the day after they are registered on the Federal Register of Legislation. However, applications by evacuees from Afghanistan for Subclass 201 (In-country Special Humanitarian) visas cannot be made until the Minister makes a determination under section 91L of the Migration Act. That is because holders of Subclass 449 (Humanitarian Stay (Temporary)) visas are prevented by section 91K of the Migration Act from applying for other classes of visa unless the Minister exercises the power in section 91L to 'lift the bar'. It is anticipated that this will occur in stages following the commencement of the Regulations.

Clause 10202 – Applications for Refugee and Humanitarian (Class XB) visas made before commencement

Clause 10202 provides a transitional arrangement to assist evacuees from Afghanistan who, at the time of evacuation, already had a part-processed application for a Refugee and Humanitarian (Class XB) visa. Those applications are not covered by the amendments outlined above, which only apply to applications made after the commencement of these regulations.

The effect of the transitional provision is that an applicant who applied for a Refugee and Humanitarian (Class XB) visa outside Australia, and who enters Australia as an evacuee from Afghanistan before the application is decided, can be granted the visa in Australia if applicable criteria are satisfied.

An application for a Refugee and Humanitarian (Class XB) visa is an application for all five visa subclasses within that visa class:

- Subclass 200 (Refugee);
- Subclass 201 (In-country Special Humanitarian);
- Subclass 202 (Global Special Humanitarian);
- Subclass 203 (Emergency Rescue); and
- Subclass 204 (Woman at Risk).

The transitional provision has been drafted to cover all five subclasses, to ensure comprehensive coverage. However, almost all of the applications covered by this transitional arrangement were being processed in relation to the Subclass 201 (In-country Special Humanitarian) visa. An additional transitional provision has been included for that subclass (subclause 10202(2)). This was necessary because it is the only subclass that requires the applicant to be living in the home country at time of application and at time of decision. The effect of subclause 10202(2) is that it is not a requirement that, at time of decision, the applicant is living in Afghanistan.

The effect of subclause 10202(3) is that an evacuee from Afghanistan may be in Australia (other than in immigration clearance) or outside Australia at the time of grant. This aligns the position with applicants who apply in Australia (items [9] and [10] above). As noted in relation to those items, it is anticipated that all applicants will be in Australia when the visa is granted.