EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022

The *Migration Act 1958* (the Migration Act) relates 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. Section 40 also provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances. Subsection 46(3) provides that the regulations may prescribe the criteria and requirements which an application must satisfy to be valid.

The *Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to enable the 'COVID-19 concession' cohort to access the 'relationship cessation provisions' (RCPs) as part of meeting the criteria for grant of a Subclass 100 Partner visa or a Subclass 309 Partner (Provisional) visa.

The Regulations make amendments to the Migration Regulations that enable Subclass 100 visa applicants to access RCPs to meet the primary criteria for the grant of a Subclass 100 visa, if the applicant was granted their Subclass 309 visa in Australia under the COVID-19 concession, and their sponsoring partner has died, or their relationship with their sponsor has ceased. This ensures that applicants granted a Subclass 309 visa in Australia under the COVID-19 concession, and who satisfy the Minister that they were the spouse or de facto partner of their sponsoring partner, continue to be eligible to access a pathway to permanent residence in the following relationship cessation circumstances:

- the applicant's sponsor has died; or
- the relationship between the applicant and the sponsor has ceased and either or both of the following apply:
    - the applicant or a member of the family unit has suffered domestic and family violence (DFV) committed by the sponsoring partner;
    - the applicant and sponsor share custody, formal maintenance obligations or access rights to at least one child.

The Regulations also make amendments to the Migration Regulations to enable Subclass 309 visa applicants to access the RCPs to meet the primary criteria for the grant of a Subclass 309 visa. The amendments apply to Subclass 309 visa applicants who are in Australia, who are eligible to be granted their visa under the COVID-19 concession in Australia, and who satisfy the

Minister they were the spouse or de facto partner of their sponsoring partner and the relationship with the sponsoring partner has ceased as a result of the relationship cessation circumstances outlined above.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions 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 such as the COVID-19 pandemic.

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

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

The Department of Home Affairs consulted with a number of stakeholders including affected visa holders and applicants, who have raised concerns about the inability to access relevant relationship cessation provisions. No external consultation was undertaken as the amendments are either beneficial for affected persons or do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on 19 August 2022.

The Department follows standard practices to notify clients about the Regulations, including updating its website and notifying peak bodies.

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

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

Statement of Compatibility with Human Rights

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

Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022

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

Overview of the Disallowable Legislative Instrument

The *Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to enable access to certain 'relationship cessation provisions' for Partner (Provisional) (subclass 309) visa applicants and holders whose visas have been, or can be, granted in Australia. These amendments ensure that subclass 309 applicants and holders are not disadvantaged by the *Migration Amendment 2021 Measures No.1 Regulations 2021* (the 2021 Measures No.1), introduced on 18 February 2021, which temporarily allows subclass 309 visa applicants to be granted their visa in Australia.

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

The COVID-19 concession period commenced on 1 February 2020 and ends on a day specified by the Minister in a legislative instrument, as prescribed under subregulation 1.15N(2) of the Migration Regulations.

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

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

Subclass 309 visa holders

Prior to the Regulations, subclass 309 visa holders were eligible to access these 'relationship cessation provisions' to enable grant of their Partner (Permanent) (subclass 100) visa, but only if they first entered Australia as a holder of a subclass 309 visa. As a result, subclass 309 visa holders whose visas had been granted in Australia during the COVID-19 concession period were not eligible to access the 'relationship cessation provisions'.

The Regulations ensures that subclass 309 visa holders who are granted their visa in Australia continue to be eligible for the grant of their permanent subclass 100 visa, despite their relationship with their sponsor ceasing, where the 'relationship cessation provisions' apply. They do so by incorporating a new 'time of decision' criteria which prescribes that a subclass 100 visa applicant meets the primary criteria if the applicant holds a subclass 309 visa granted in Australia and:

- the sponsor died and the Minister is satisfied that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; or
- the relationship with their sponsor has ceased and the applicant, or a member of the family unit of the applicant or the sponsor, has suffered DFV committed by the sponsor; or
- the relationship with their sponsor has ceased and the applicant has custody or access rights to at least one child in respect of whom the sponsor also has custody or access rights to.

Subclass 309 visa applicants

In relation to subclass 309 visa applicants, the Migration Regulations did not enable this cohort to be granted their combined subclass 309 visa or subclass 100 visa following a relationship cessation with their sponsor, under any circumstance.

The Regulations also enables certain subclass 309 visa applicants who have travelled to Australia and who, because of the COVID-19 concession, may remain onshore until they receive an outcome, sometimes for a significant period of time, to be eligible for the grant of their combined subclass 309 and 100 visas, despite their relationship with their sponsor ceasing, where the 'relationship cessation provisions' apply. They do so by amending the primary criteria to be satisfied at the time of decision which enables subclass 309 visa applicants who are eligible to be granted their visa in Australia, and who have experienced one of the circumstances outlined above, to be granted their combined subclass 309 and 100 visas if they have entered Australia after lodgement and are currently in Australia. This aligns settings for the subclass 309 visa more closely to those currently in place for 'onshore' temporary Partner (subclass 820) visa applicants.

Where a subclass 309 visa applicant intended to marry their sponsor at the time of application, the Regulations allows for the grant of a subclass 309 visa on the basis of the 'relationship cessation provisions' if the applicant is in Australia and was either the spouse or de facto partner of the sponsor prior to the sponsor's death or the relationship ceasing. This provides the opportunity for visa applicants who were yet to marry their intended spouse, to demonstrate they were in a de facto relationship with their sponsor, in order to access the expanded provisions.

Human rights implications

This Disallowable Legislative Instrument positively engages rights relating to family unity including:

- Article 23 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- Article 9 of the *Convention on the Rights of the Child (CRC).*

Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 9 of the CRC provides that a State shall ensure that a child shall not be separated from their 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. The State shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Providing a pathway to permanent residence to subclass 309 visa holders and applicants who have custody or access rights to at least one child that they share with their former sponsor ensures that parents are not separated from their child as a result of changes to their relationship status, which promotes the protection of the family.

In situations where a subclass 309 visa holder's or applicant's spouse has died, the amendments may also be relevant to preserve that applicant's personal ties to other family unit members or other close relatives who may be in Australia.

This Disallowable Legislative Instrument also positively engages rights relating to protection against exploitation, violence and abuse.

Article 9 of the CRC provides that States shall take all appropriate legislative, measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The United Nations Committee on the Elimination of All Forms of Discrimination against Women has stated that gender-based violence, including domestic violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

The family violence provisions (FVPs), which are part of the 'relationship cessation provisions', are intended to protect not only partners and spouses who are experiencing DFV but also members of their family unit, including children. The amendments enable subclass 309 visa applicants and holders' access to the FVPs on the basis that the visa applicant or holder, or a member of their family unit, including a child, has experienced DFV. The amendments remove the incentive for visa applicants and holders to remain in a violent or dangerous relationship for a visa outcome.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it provides a positive benefit to subclass 309 visa applicants and holders whose visa can or has been granted in Australia and promotes human rights.

THE HON. ANDREW GILES

Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT B

Details of the *Migration Amendment (Subclass 100 and 309 Visas)* Regulations 2022

Section 1 - Name

This section provides that the name of the instrument is the *Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022* (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 commence, or are be 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 registration on the Federal Register of Legislation.

Section 3 - Authority

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

Section 4 - Schedules

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

Schedule 1 – Amendments

Part 1 – Main amendments

Item [1] – Clause 100.111 of Schedule 2 (paragraph (a) of the definition of *sponsoring partner*)

This item omits the reference to "or (4A)(a)" and substitutes ", (4A)(a), (4B)(a) or (4C)(a)" in paragraph (a) of the definition of *sponsoring partner* in clause 100.111 of Schedule 2 to the Migration Regulations.

This amendment is consequential to the addition of new subclauses 100.221 (4B) and 100.221(4C) made by Item 3.

Item [2] – Subclause 100.221(1) of Schedule 2

This item omits the reference to "or (4A)" and substitutes ", (4A), (4B) or (4C)" in subclause 100.221(1) of Schedule 2 to the Migration Regulations.

This amendment is consequential to the addition of new subclauses 100.221(4B) and 100.221(4C) made by Item 3.

Item [3] – After subclause 100.221(4A) of Schedule 2

This item inserts new subclauses 100.221(4B) and 100.221(4C) in clause 100.221 in Schedule 2 to the Migration Regulations.

Currently, an applicant for a Subclass 100 (Partner) visa (Subclass 100 visa) must have first entered Australia as the holder of a Subclass 309 (Partner (Provisional)) visa (Subclass 309 visa) and continue to be the holder of that visa to have access to 'relationship cessation provisions' (RCPs). Only Subclass 309 holders who applied for and were granted their Subclass 309 visa offshore before first entering Australia are eligible to be granted the Subclass 100 visa on the basis of meeting RCPs in the primary criteria for the Subclass 100 visa to be assessed at the time of decision.

However, due to the amendments made by the *Migration Amendment 2021 Measures No.1 Regulations 2021* (the 2021 Measures No.1), which commenced on 27 February 2021, applicants for a Subclass 309 visa who apply for their visa offshore but are onshore and not in immigration clearance at the time of grant, are able to be granted their Subclass 309 visa while they are inside Australia, on the basis they meet subclause 309.412(2) ("COVID-19 concession"). This means that those Subclass 309 visa holders granted in Australia under the COVID-19 concession are currently unable to access the RCPs, as they did not 'first enter Australia as the holder of a Subclass 309 visa'.

New subclauses 100.221(4B) and (4C) allow Subclass 100 visa applicants eligible for the grant of a permanent visa where they meet the following requirements:

- the applicant's Subclass 309 visa was granted in Australia under the COVID-19 concession; and
- the applicant would meet the requirements of subclause (2) or (2A) of clause 100.221 except that either the sponsoring partner has died or the relationship between the applicant and the sponsoring partner has ceased; and
- either:
    - the applicant meets the requirement of either subclause 309.221(2) or 309.221(3), discussed further in Item [7]; or
    - the applicant's sponsoring partner has died and the Minister is satisfied that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner, if they had not died; or
    - the applicant's relationship with their sponsoring partner has ceased, and either or both of the following apply:
        - the applicant or a member of the family unit has suffered domestic and family violence (DFV) committed by the sponsoring partner;
        - the applicant and sponsor share custody, formal maintenance obligations or access rights to at least one child.

The effect of the amendments is to enable Subclass 100 visa applicants who were granted a Subclass 309 visa on the basis that they met the COVID-19 concession criteria to access the RCP's.

These amendments restore the original policy intention of the RCPs, to enable the grant of permanent Partner visas for Subclass 309 visa holders who are in Australia, where the applicant's relationship with their sponsor has ceased due to the circumstances outlined above. It also mitigates the risk of vulnerable persons, who were granted a Subclass 309 visa in Australia because of the COVID-19 concession, remaining in Australia without a permanent visa pathway.

Item [4] – Paragraph 100.221(7)(b) of Schedule 2

This item omits a reference to "or 4" in paragraph 100.221(7)(b) of Schedule 2 to the Migration Regulations, and substitute ",(4), (4B) or (4C)".

This amendment is consequential to the addition of new subclauses 100.221(4B) and 100.221(4C) made by Item 3.

The effect of the amendment is to ensure that an applicant who satisfies the new criteria (that is, that their sponsoring partner has died (under subclause100.221(4B)) or their relationship with the sponsoring partner has ceased (under subclause 100.221(4C)) is not subject to the prescribed two year waiting period in subclauses 100.221(2) and (2A), if subclauses 100.221(5) and 100.221(6) apply. This aligns the position of new applicants who have been subject to the COVID-19 concession, with current applicants not affected by the COVID-19 concession but eligible under the existing RCPs, who are not subject to the prescribed two-year waiting period.

Item [5] – Paragraph 100.226(b) of Schedule 2

This item omits a reference to "or (4)", and substitute ", (4), (4B) or (4C)" in paragraph 100.226(b) of Schedule 2 to the Migration Regulations.

This amendment is consequential to the addition of new subclauses 100.221(4B) and 100.221(4C) by Item [3].

Item [6] – Subclause 309.211(3) of Schedule 2 (note)

This item inserts a reference to 'then, except in certain circumstances', after '309.211(3)' in the note at the end of subclause 309.211(3) of Schedule 2 to the Migration Regulations.

This amendment is consequential to the amendment of clause 309.224 made by Item [9].

Item [7] – Clause 309.221 of Schedule 2

This item repeals clause 309.221 and substitutes new clause 309.221 in Schedule 2 to the Migration Regulations.

New clause 309.221 inserts requirements for the grant of a Subclass 309 visa for applicants who are eligible to be granted their visa in Australia under the COVID-19 concession.

New subclause 309.221(1) provides that a Subclass 309 visa applicant may satisfy this time of decision criterion if either of the following apply:

- the applicant continues to be the spouse or de facto partner of their sponsor;
- the applicant is in Australia and could be granted their visa under the COVID-19 concession and the applicant meets the requirements of subclause 309.221(2) or (3), outlined below.

New subclause 309.221(2) provides that a Subclass 309 applicant meets the requirements of this subclause if the applicant would continue to meet the requirements of clause 309.211 except that the sponsoring partner has died, and the applicant satisfies the Minister that the applicant would have continued to be the spouse or de facto partner of their sponsor if the sponsoring partner had not died. The effect of this amendment is to allow applicants to be eligible to be granted a Subclass 309 visa despite the death of the sponsor and under certain circumstances.

New subclause 309.221(3) provides that a Subclass 309 applicant meets the requirements of this subclause if the applicant would continue to meet the requirements of clause 309.211 except that the relationship between the applicant and the sponsoring partner has ceased and either or both of the following applies:

- the applicant or a member of the family unit has suffered domestic and family violence (DFV) committed by the sponsoring partner;
- the applicant and sponsor share custody, formal maintenance obligations or access rights to at least one child.

The effect of new clause 309.221 allows a specific category of applicants, who can be granted their Subclass 309 visa under the COVID-19 concession and whose relationship with their sponsor has ceased under certain circumstances, to access RPCs. Significantly, this works in conjunction with the amendments in Item 3 to extend the pathway to a Subclass 100 permanent partner visa to applicants who fall into this category.

Item [8] – Clause 309.223 of Schedule 2

This item repeals clause 309.223 and substitute new clause 309.223 of Schedule 2 to the Migration Regulations.

Currently, clause 309.223 requires that a Subclass 309 visa applicant who applies as a spouse or de facto partner of an eligible sponsor (being an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen) must continue to satisfy this requirement at the time of decision.

New clause 309.223 retains the existing requirement and also provide that an applicant may meet the requirements of clause 309.223 if either of the following applies:

- the applicant continues to be the spouse or de facto partner of the person who was the applicant's spouse or de facto partner at the time of application; or
- the applicant meets the requirements of paragraph 309.221(1)(b), as outlined above in Item 7.

These amendments are consequential to Item 7. The effect of the amendments is to ensure that if an applicant meets the criteria in paragraph 309.221(1)(b), even though the applicant does not continue to be the spouse or de facto partner of the person who was their eligible sponsor, they may meet the requirements of this clause.

Item [9] – Clause 309.224 of Schedule 2

This item repeals clause 309.224 and substitutes new clause 309.224 in Schedule 2 to the Migration Regulations.

Currently, clause 309.224 requires that, where a Subclass 309 visa applicant applies on the basis that they intend to marry an eligible sponsor, that marriage has taken place, it is a valid marriage for the purposes of section 12 of the Migration Act, and the applicant continues to be the spouse of the intended sponsor at the time of decision.

New clause 309.224 retains the existing requirement and includes a new provision to the same effect as new clause 309.223 as outlined in Item 8 above. That is, a Subclass 309 applicant satisfies the requirements of clause 309.224 if the following criteria are satisfied:

- paragraph 309.221(1)(b), as to be amended by these Regulations by Item 7);
- before the intended spouse died, or prior to the cessation of the relationship between the applicant and the intended spouse, the applicant was the spouse or the de facto partner of the intended spouse.

These amendments are consequential to Item 7 and ensure that if an applicant meets the criteria in paragraph 309.221(1)(b), even though they did not marry the intended spouse, and they do not continue to be the spouse or de facto partner of the person who was their eligible sponsor, they may meet the requirements of this clause.

Part 2 – Application of amendments

Item [10] – In the appropriate position in Schedule 13

This item inserts new Part 113 – Amendments made by the *Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022* – in Schedule 13 (Transitional Arrangements) to the Migration Regulations.

Paragraph 11301 provides that the amendments made by Part 1 of Schedule 1 to the Regulations, which allows the COVID-19 concession cohort of Subclass 309 applicants and holders to access RPCs in certain circumstances, applies in relation to a decision to grant or not grant a Subclass 100 visa or a Subclass 309 visa made on or after the commencement of Schedule 1 to the Regulations, whether the application for the visa was made before, on or after commencement.