

## **EXPLANATORY STATEMENT**

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (Location Requirements for Grant of Visa)  
Regulations 2023*

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

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, section 40 of the Migration Act provides that the regulations may prescribe that visas may only be granted in specified circumstances and the circumstances may include that the person is either in Australia or outside Australia when the visa is granted. Subsection 31(3) provides that the regulations may prescribe criteria for visas. Subsection 338(9) provides that a prescribed decision is a Part 5-reviewable decision, for merits review purposes. Paragraph 347(2)(d) provides that for such prescribed decisions, an application for merits review may only be made by a prescribed person.

The *Migration Amendment (Location Requirements for Grant of Visa) Regulations 2023* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to:

- provide flexibility in relation to Partner (Subclass 309 and 820) and Temporary Graduate (Subclass 485) visas by allowing applicants to be either in or outside Australia at the time of visa grant; and
- provide Subclass 309 Partner visa applicants with standing to apply for merits review themselves, rather than the sponsor, to facilitate better access for family violence victims and other compassionate circumstances. This is already available for Subclass 820 Partner visa applicants.

Since 2020, various concessions have been introduced to assist visa applicants who were affected by the COVID-19 Pandemic-related travel restrictions and border closures. These concessions included removing the requirements in relation to where the applicant must be located at the time of visa grant. These concessions were available during a concession period (the COVID-19 concession period) which commenced on 20 February 2020 and is scheduled to end on 25 November 2023.

These amendments ensure that the flexibility to be either in or outside Australia at the time of visa grant remains in place for these visas even after the COVID-19 concession period ends, and also extends this flexibility to the Subclass 820 Partner visa to align with the Subclass 309 Partner visa. These amendments provide a beneficial flexibility that permits the relevant visa to be granted regardless of where the applicant is located at the time of visa grant.

The Regulations also make consequential amendments to ensure that access to merits review is retained. They also provide for a Subclass 309 visa applicant to have standing to apply for merits review directly, rather than the sponsor. This facilitates access to merits review for applicants who may be affected by circumstance such as family violence and to align with the onshore Subclass 820 visa which provides standing to the applicant rather than the sponsor.

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 settings in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

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

The Office of Impact Analysis was consulted prior to making the Amendment Regulations, and advised that an impact analysis was not required. The OIA reference numbers are OIA 23-05547 and 23-05777.

Formal public consultation on these matters specifically was not considered necessary as the amendments are entirely beneficial and address concerns that had been raised through public consultations in the context of trafficking and access to the family violence provisions outside Australia. The Administrative Appeals Tribunal was consulted on the changes to give standing to Subclass 309 applicants to seek merits review. The amendments do not substantially alter the operation of the existing legislative scheme. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which requires that appropriate and reasonably practicable consultation be undertaken.

The Migration Regulations are exempt from sunseting pursuant to item 38A of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

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

The amendments commence on the day after registration.

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

**Statement of Compatibility with Human Rights**

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

***Migration Amendment (Location Requirements for Grant of Visa)  
Regulations 2023***

The *Migration Amendment (Location Requirements for Grant of Visa) Regulations 2023* are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview**

The *Migration Amendment (Location Requirements for Grant of Visa) Regulations 2023* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to remove the location requirements for all Subclass 309 (Partner (Provisional)), 485 (Temporary Graduate) and 820 (Partner (Temporary)) visa applicants at the time of visa grant. This allows all applicants for these visas to be either in or outside Australia, but not in immigration clearance. The amendments also extend access to merits review avenues for Subclass 309 visa applicants.

The Subclass 309 and 820 Partner visas are provisional (temporary) visas granted to applicants who are married to or in a de facto relationship with an Australian citizen, permanent resident or eligible New Zealand citizen sponsor. Each have a corresponding permanent visa (being the Subclass 100 and 801 respectively) for which application is made simultaneously with the temporary visa. In general terms, an applicant is eligible for consideration of the grant of the permanent visa after two years from lodgement of the original visa application.

The Subclass 485 visa allows international students, who have recently completed qualifications in Australia, to remain temporarily in Australia to live, study and work.

Following the introduction of COVID-19 Pandemic-related travel and other restrictions, and in recognition of the practical difficulties of international travel during the Pandemic, in 2020 and 2021 the Government amended the Migration Regulations to enable visa grants to occur regardless of the applicant's location and a range of other concessions to certain visa applicants who were impacted by the COVID-19 Pandemic and the associated travel disruptions. This included an amendment to introduce a temporary 'concession period' defined in subregulation 1.15N(1). The 'concession period' under subregulation 1.15N(1) commenced on 1 February 2020 and ends on 25 November 2023. The objective of the COVID-19 concession amendments was to ensure that certain temporary and provisional visa holders, including individuals who were on a pathway to permanent residence, were not disadvantaged by circumstances beyond their control, including border closures and disruptions to international travel related to COVID-19.

As part of the introduction of COVID-19 concessions, amendments were made to various visa subclasses to remove the location requirements for visa grant. This included

amendments to the Subclass 309 visa and Subclass 485 visa. Previously, subclass 309 visa applicants were required to be outside Australia at the time of visa grant. For Subclass 485 visa applicants, applicants were required to have been in Australia at the time of visa grant. However, the COVID-19 concession amendments allowed for Subclass 309 applicants who were in Australia during the concession period to be able to have their visas granted whilst they were in Australia. The COVID-19 concession amendments also meant that an applicant for a Subclass 485 visa could be outside Australia at time of grant. The end of the ‘concession period’ would mean that impacted visa applicants will be limited to the respective location requirements that existed prior to the ‘concession period’.

The amendments made by the Amendment Regulations simplify the location requirements for the grant of Subclass 309 and 485 visas and no longer require applicants for those visas to be in a particular location for their visa to be granted, including after the end of the ‘concession period’. Accordingly all applicants for these visas may be in or outside Australia but not in immigration clearance for their visa to be granted.

These amendments ensure that Subclass 309 visa applicants who travelled to Australia after lodging their application are not required to leave Australia in order to be granted a visa. They also ensure Subclass 485 visa applicants who travelled outside Australia after making their application do not need to travel to Australia before their visa may be granted. A similar amendment is made to the Subclass 820 visa for consistency with the Subclass 309 visa, as well as with the permanent subclass 100 and 801 visas (the permanent partner visas) which also allow the applicant to be either in or outside Australia at the time of grant.

In addition, the Amendment Regulations also provide merits review avenues for applicants for a Subclass 309 visa, regardless of whether the application is refused while they are in or outside Australia. This continues and extends the position Subclass 309 visa applicants had under the ‘concession period’, to give the applicant standing to seek merits review of a decision to refuse a Subclass 309 visa in all circumstances.

## **Human rights implications**

The amendments made by the Amendment Regulations are intended as a beneficial measure for Subclass 309, 485 and 820 visa applicants, by ensuring that there is no requirement for an applicant to leave Australia for visa grant (for Subclass 309), or conversely, to re-enter Australia for visa grant (for Subclass 485 and 820), beyond the end of the ‘concession period’ introduced during the COVID-19 Pandemic.

These amendments as they relate to Subclass 309 and 820 visas promote rights relating to family unity, in particular:

- Article 23 of the *International Covenant on Civil and Political Rights* (ICCPR)

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, and that the right of men and women of marriageable age to marry and to found a family shall be recognised.

Providing the ability to grant all Partner visas in Australia avoids the need to disrupt family unity by requiring the applicant to be in a specific location for the grant of the visa. The

amendments further strengthen merits review avenues by giving the applicant standing to seek merits review in all circumstances.

Together, these amendments assist in supporting the family unity of the visa applicant and their Australian spouse/de facto partner as well as their children, including children who are Australian citizens or permanent residents, or who are included as part of the applicant's visa application.

### **Conclusion**

The Amendment Regulations are compatible with human rights.

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

**Details of the Migration Amendment (Location Requirements for Grant of Visa) Regulations 2023**

**Section 1 - Name**

This section provides that the name of the Regulations is the *Migration Amendment (Location Requirements for Grant of Visa) Regulations 2023*.

**Section 2 - Commencement**

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 - Authority**

This section provides that the Regulations are 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**

***Migration Regulations 1994***

**Item [1] – Paragraph 4.02(4)(s)**

This item repeals paragraph 4.02(4)(s) of Part 1 of the *Migration Regulations 1994* (the Migration Regulations) and substitutes new paragraphs 4.02(4)(s) and 4.02(4)(saa).

Regulation 4.02 prescribes decisions as Part-5 reviewable decisions for the purposes of subsection 338(9) of the Migration Act. Part-5 reviewable decisions are subject to merits review by the Administrative Appeals Tribunal (AAT).

The current paragraph 4.02(4)(s) prescribes refusals to grant a Subclass 309 or 300 visa as reviewable decisions under subsection 338(9) of the Migration Act, only if they the application for the visa was made during the COVID-19 concession period described in subregulation 1.15N(1) of the Migration Regulations. It was necessary to prescribe these decisions under section 338(9) of the Migration Act to ensure that an applicant whose Subclass 300 or 309 visa application is refused continues to have a right to seek merits review by the AAT. This is because applications for the visas are made while the applicants are outside Australia although the visa could be granted when the applicant is in Australia. This means that the decision would not be a Part-5 reviewable decision under subsection 338(2) or (5) of the Migration Act.

New paragraphs 4.02(4)(s) and 4.02(4)(saa) separately prescribe the decision to refuse a Subclass 300 and 309 visa as reviewable decisions under subsection 338(9) of the Migration Act. New paragraph 4.02(4)(s) retains the existing prescribed decision for Subclass 300 visa applications which requires the Subclass 300 visa application to have been made during the concession period. This is because Subclass 300 visa applicants must still be outside Australia at the time of application and grant unless they applied during the COVID-19 concession period.

New paragraph 4.02(4)(saa) prescribes a decision to refuse to grant a Subclass 309 visa, to ensure those decisions are Part-5 reviewable decisions.

### **Item [2] – Paragraph 4.02(5)(r)**

This item repeals paragraph 4.02(5)(r) of Part 1 of the Migration Regulations and substitutes new paragraphs 4.02(5)(r) and 4.02(5)(raa).

Sub-regulation 4.02(5) identifies the person who has standing to make an application for merits review for the purposes of subsection 347(2) of the Migration Act, for the relevant reviewable decision prescribed in subregulation 4.02(4) of the Migration Regulations. Paragraph 4.02(5)(r) identifies the person who may apply for review of a decision to refuse to grant a Subclass 300 (Prospective Marriage) visa, or Subclass 309 (Partner (Provisional)) visa, where the application for either visa was made during the concession period described in subregulation 1.15N(1) and the applicant was in Australia at the time of the decision to refuse.

Previously, paragraph 4.02(5)(r) provided that the person who may apply for merits review of the refusal decision of a Subclass 300 visa was the sponsor. It also provided that the person who may apply for merits review of the refusal decision of a Subclass 309 was the applicant. It was necessary to prescribe the person who has standing to seek merits review because the decisions to refuse a Subclass 300 visa and a Subclass 309 visa were not decisions under subsections 338(2) or (5) of the Migration Act, and consequently did not have a specified person who had standing to seek merits review under subsection 347(2) of the Migration Act.

The insertion of new paragraphs 4.02(5)(r) and 4.02(5)(raa) is a consequential amendment to the amendment in item [1]. New paragraph 4.02(5)(r) retains the sponsor as the person who may seek review of a decision to refuse to grant a Subclass 300 visa, where the application for the Subclass 300 visa was made during the concession period described in subregulation 1.15N(1) of the Migration Regulations. New paragraph 4.02(5)(raa) provides that the person who may apply for merits review, in relation to the Subclass 309 visa, is the applicant.

The effect of this amendment is to provide all Subclass 309 applicants with standing to seek merits review of a decision to refuse to grant their Subclass 309 visa, rather than the sponsor.

### **Item [3] – Paragraph 100.221(4B)(a) of Schedule 2**

### **Item [4] - Paragraph 100.221(4C)(a) of Schedule 2**



Items [3] and [4] repeal paragraphs 100.221(4B)(a) and 100.221(4C)(a) of Schedule 2 to the Migration Regulations and substitute new paragraphs 100.221(4B)(a) and 100.221(4C)(a) respectively.

These items make a consequential amendment to remove the reference to subclause 309.412(2) which is being repealed by item [6] below. They instead spell out what the effect of that subclause was – that the person was in Australia, but not in immigration clearance, at the time the Subclass 309 visa was granted. This does not change the operational effect of this paragraph.

#### **Item [5] - Paragraph 309.221(1)(b) of Schedule 2**

This item repeals paragraph 309.221(1)(b) of Schedule 2 to the Migration Regulations and substitutes new paragraph 309.221(1)(b).

This item makes a consequential amendment to remove the reference to subclause 309.412(2) which is being repealed by item [6] below. Subclause 309.412(2) refers to applicants who were impacted the COVID-19 concession and who were permitted to be in Australia at the time of visa grant.

Paragraph 309.211(1)(b) permits persons who were impacted by the COVID-19 concession and were in Australia at the time of visa decision to be eligible for the grant of the Subclass 309 Partner visa even where the relationship broke down due to family violence or where there are shared children, or where the sponsor has deceased.

Following the ending the ending of the COVID-19 concessions, these Regulations provide that all Subclass 309 applicants may be either in or outside Australia at the time of visa grant. The amendment does not change the operational effect of the provision. It ensures that applicants who are in Australia at the time of visa decision will be eligible for the grant of a Subclass 309 visa even where the relationship has ended in the above circumstances.

#### **Item [6] - Clause 309.412 of Schedule 2**

#### **Item [7] – Clause 485.411 of Schedule 2**

#### **Item [8] - Clause 820.411 of schedule 2**

These items repeal clauses 309.412, 485.411 and 820.411 of Schedule 2 to the Migration Regulations and substitute new clauses 309.412, 485.411 and 820.411 respectively.

Previous clauses 309.412, 485.411 and 820.411 specified where an applicant must be at the time their visa is granted. Clause 820.411 required all visa applicants to be in Australia at the time of grant, whilst clauses 309.412 and 485.411 required different cohorts of Subclass 309 and 485 applicants to be in different locations at the time of grant. However, following the end of the COVID-19 concession period the requirement to be at a specific location at the time of grant is inappropriate, costly and inflexible.

New clauses 309.412, 485.411 and 820.411 remove the location requirements to allow Subclass 309, Subclass 485 and Subclass 820 visa applicants to be either in or outside Australia, but not in immigration clearance, at the time of visa grant.

The effect of these amendments is to allow for flexible arrangements and appropriate requirements at the time of grant which recognises the mobility of modern travellers and that they may have moved locations before the visa is ready for grant.

### **Item [9] – in the appropriate position in Schedule 13**

This item inserts new Part 124 in Schedule 13 to the Migration Regulations. The purpose of Part 124 is to provide for the application of the amendments made by the Regulations.

### **Clause [12401] Definitions**

Clause 12401 defines amendment regulations to mean the *Migration Amendment (Location Requirements for Grant of Visa) Regulations 2023*.

### **Clause [12402] Operation of Schedule 1**

Subclause 12402(1) provides that the amendments made by items [1] and [2] of Schedule 1 to the amending regulations apply in relation to a decision to refuse to grant a Subclass 300 or Subclass 309 made on or after the commencement of the amendments, whether the visa application was made before, on or after that commencement.

Subclause 12402(2) provides that the amendments made by items [3] to [8] of Schedule 1 to the amending regulations apply in relation to a visa granted on or after the commencement of these amendments, whether the application for the visa was made before, on or after that commencement.