

## EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024*

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 may be made pursuant to the provisions listed in Attachment A.

The *Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations), to enable a cohort of secondary applicants for Subclass 309 (Partner (Provisional)) and Subclass 100 (Partner) visas who, due to the impact of the now revoked Ministerial Direction 80<sup>1</sup>, no longer meet the age requirement for the visa, to be eligible for the grant of the visa. Ministerial Direction 80 gave the lowest processing priority to applications for Family visas where the sponsor was a permanent resident who entered Australia as an Unauthorised Maritime Arrival, and was revoked on 9 February 2023.

A ‘secondary’ applicant is generally a close family member of the primary applicant, who in this case is the partner of an Australian citizen or permanent resident. The Amendment Regulations enables a secondary applicant to be eligible for the grant of the visas as a ‘dependent’ of the primary applicant rather than as a member of the family unit (MoFU).

The definition of MoFU under regulation 1.12 of the Migration Regulations includes an age limit relating to who is considered to be a ‘child’ of another person (the family head, who is generally the primary applicant for a visa) for most applicants. The usual rule under the MoFU definition is that a child must be either under 18, or under 23 and dependent on the family head, or wholly reliant on the family head due to incapacitation for work as a result of the total or partial loss of the person’s bodily or mental functions.

The now revoked Ministerial Direction 80 provided the lowest processing priority to Family visa applications, including applications for a Subclass 309 or Subclass 100 visa, where the sponsor was a permanent visa holder who arrived in Australia as an unauthorised maritime arrival (UMA), resulting in extended processing times for such applications. As a result of these extended processing times, a cohort of secondary applicants have passed the age of 23 and are no longer able to satisfy the criteria requiring them to be a MoFU of the primary applicant at the time of decision.

The Amendment Regulations amend the relevant criteria to provide that applicants in these circumstances need only satisfy the Minister that they remain dependent on the primary applicant at

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<sup>1</sup> Ministerial Direction 80, *Order for considering and disposing of Family visa applications under s47 and s51 of the Migration Act 1958*, was made under s499 of the *Migration Act 1958*, on 21 December 2018.

the time the decision is made on their application, regardless of their age. The effect of this change is limited to those visa applications made before 9 February 2023 but not yet finally determined.

The matters dealt with in the Amendment 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 matters of visa criteria and visa 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.

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 effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

The Amendment Regulations amend the Migration Regulations, which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and other Matters) Regulations 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is necessary 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 Legislation Act.

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. The Statement is at [Attachment B](#).

The Office of Impact Analysis (the OIA) has been consulted in relation to the amendments. No Impact Analysis is required. The OIA consultation reference number is OIA23-05968.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Section 17 of the Legislation Act provides that the rule-maker must be satisfied that there has been undertaken any consultation that is appropriate and reasonably practicable before making a legislative instrument. This issue has been raised with the Minister and the Department on numerous occasions by impacted sponsors, stakeholders and Members of Parliament. The specific detail of the amendments has not been consulted on, but there is support for an amendment to avoid further disadvantage to this cohort.

The Amendment Regulations commence the day after the instrument is registered on the Federal Register of Legislation.

Further details of the Regulations are set out in [Attachment C](#).

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

**AUTHORISING PROVISIONS**

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

- subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class.

## **Statement of Compatibility with Human Rights**

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

### ***Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024***

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 (Dependent Secondary Partner Visa Applicants) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations), to enable a cohort of secondary applicants for Subclass 309 (Partner (Provisional)) and Subclass 100 (Partner) visas who, due to the impact of the now revoked Ministerial Direction 80<sup>2</sup>, no longer meet the age requirement for the visa, to be eligible for the grant of the visa. Ministerial Direction 80 gave the lowest processing priority to applications for Family visas where the sponsor was a permanent resident who entered Australia as an Unauthorised Maritime Arrival, and was revoked on 9 February 2023.

The Migration Regulations provide criteria for secondary applicants, who are generally close family members of the primary visa applicant (who in this case is the partner of an Australian citizen or permanent resident), to also be granted a Partner visa if the primary visa applicant is granted a Partner visa. The criteria for secondary applicants for a Subclass 309 visa included that the applicant must be a ‘member of the family unit’ of the primary applicant, at the time of applying for the visa and, prior to the amendments made by the Amendment Regulations, at the time a decision is made on their application. ‘Member of the family unit’ is defined in regulation 1.12 of the Migration Regulations. Under regulation 1.12, a child or step-child of a visa applicant is a ‘member of the family unit’ if they are under 18, between 18 and 23 and dependent on the primary applicant for their basic needs, or over 23 and dependent on the primary applicant because of a disability that incapacitates them for work.

Under Ministerial Direction 80 (and prior Ministerial Directions 72 and 62) on the order of processing of Family visa applications, the lowest processing priority was given to applicants for Family visas whose sponsor was a permanent visa holder who arrived in Australia as an unauthorised maritime arrival (UMA). The Directions led to extended processing times for these applications. As a result of these extended processing times, some secondary applicants no longer meet the age limits in the ‘member of the family unit’ definition, and, prior to the amendments made by the Amendment Regulations, could not meet the secondary criteria for the grant of a subclass 309 visa.

The Amendment Regulations amend the secondary criteria for the grant of the Subclass 309 visa to ensure no ongoing adverse impact to this cohort of secondary applicants who were affected by the Ministerial Direction 80 before its revocation. The amendments create alternative secondary criteria for applicants who were sponsored by permanent visa holders who arrived as UMAs. Under the amendments, these applicants can meet the secondary criteria for the Subclass 309 visa if they were a

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<sup>2</sup> Ministerial Direction 80, *Order for considering and disposing of Family visa applications under s47 and s51 of the Migration Act 1958*, was made under s499 of the *Migration Act 1958*, on 21 December 2018.

member of the family unit of the primary applicant at the time of applying for the visa, and are dependent on the primary applicant (without regard to their age) at the time a decision is made on their visa application. Children under the age of 18 are not affected by the amendments as they continue to be able to meet the existing secondary criteria on the basis of being a ‘member of the family unit’.

The Amendment Regulations also make consequential changes to the permanent Subclass 100 (Partner) visa criteria to ensure that applicants granted a Subclass 309 visa under the amended criteria can subsequently be granted the permanent visa.

### **Human rights implications**

This Disallowable Legislative Instrument may positively engage the following rights:

- The right to respect for the family, contained in articles 23(1) and 17(1) of the International Covenant on Civil and Political Rights (ICCPR)
- Rights relating to equality and non-discrimination in articles 2 and 26 of the ICCPR.

#### Rights relating to respect for the family

The Amendment Regulations support the right to respect for the family.

Article 23(1) 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 17(1) of the ICCPR provides that no one shall be subjected to arbitrary interference with their family. The Migration Regulations establish visa criteria which provide for the entry and stay in Australia of persons in circumstances that may affect the unity of a family.

The amendments made by the Amendment Regulations promote human rights by facilitating family reunification and maintaining family unity in cases where dependent children of a permanent visa holder who arrived as an UMA and/or their partner have turned 23 while awaiting a decision on their Subclass 309 visa application, because of the lowest processing priority that had previously been accorded to their visa application. The amendments promote the right to respect for the family for those families, where the primary visa applicant’s adult child, as the secondary applicant, is dependent on their parent for their basic needs, even if the child is older than 23 at the time of the visa decision.

#### Rights relating to non-discrimination

The amendments made by the Amendment Regulations are aimed at addressing the adverse impacts of the lowest processing priority being accorded for a particular cohort of visa applicants. The cohort is those applicants who applied, before Ministerial Direction 80 was revoked, for a Subclass 309 visa on the basis of being a member of the family unit of a visa applicant who was sponsored for this visa by a permanent visa holder who arrived in Australia as an UMA, and who are still dependent on their parent but have turned 23 while awaiting a decision on that application. Following on from the revocation of Ministerial Direction 80, the amendments promote the rights to equality and non-discrimination for this cohort and their families.

### **Conclusion**

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

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

**Details of the Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024**

**Section 1 – Name of Regulations**

This section provides that the title of the Regulations is the *Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024* (the Amendment Regulations).

**Section 2 - Commencement**

This section provides for the Regulations to commence on the day after they are registered 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 in the Amendment Regulations operate.

**Schedule 1 – Amendments**

***Migration Regulations 1994***

**Item [1] – Subclause 100.224(1) of Schedule 2**

This item amends subclause 100.224(1) of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations), which provides that each member of the family unit of a primary applicant for a Subclass 100 (Partner) visa who is also applying for the visa must satisfy certain public interest criteria.

This item inserts ‘, and each person who is dependent on,’ with the effect that a person who is dependent on a primary applicant who has also made a Subclass 100 visa application must satisfy the prescribed public interest criteria listed in paragraph 100.224(1)(a) and – if the applicant had turned 18 at the time of application – under paragraph 100.224(1)(b). The amendment extends this requirement to applicants who are dependent on the primary applicant but who are not members of the family unit of the primary applicant, and is consequential to the amendments made by items [2] and [3] below.

**Item [2] – Paragraph 100.321(a) of Schedule 2**

This item amends paragraph 100.321(a) of Schedule 2 to the Migration Regulations, which currently provides that a secondary applicant for a Subclass 100 (Partner) visa must be the holder of a Subclass 309 (Partner (Provisional)) visa that was granted on the basis that the applicant was a member of the family unit of another person who was the holder of a Subclass 309 visa, and that other person must have been granted a Subclass 100 visa.

This item inserts ‘, or dependent on’, with the effect that an applicant who, when they were granted a Subclass 309 visa, was dependent on but not a member of the family unit of the primary applicant,

can satisfy the requirement of holding a Subclass 309 visa at the time of decision. See also item [6] below, which amends the criteria for the Subclass 309 visa.

### **Item [3] – Subparagraph 100.321(d)(ii) of Schedule 2**

This item amends subparagraph 100.321(d)(ii) of Schedule 2 to the Migration Regulations, by providing that an applicant who is a dependent child of, a member of the family unit of, or dependent on the primary applicant can satisfy the secondary criteria for the Subclass 100 visa.

Previously, subparagraph 100.321(d)(ii) was limited to ‘the dependent child, or a member of the family unit’ of the primary applicant. The amendments enable a secondary applicant who no longer falls under the definitions of a ‘dependent child’ or a ‘member of the family unit’ to be defined as ‘dependent’ and so to meet the secondary criteria.

### **Item [4] – Subregulation 309.228(1) of Schedule 2**

This item amends subregulation 309.228(1) of Schedule 2 to the Migration Regulations. This provision requires each member of the family unit of a primary applicant for a Subclass 309 (Partner (Provisional)) visa who is also applying for the visa to satisfy certain public interest criteria.

This item inserts ‘, and each person who is dependent on,’ with the effect that a person who is dependent on an applicant for a Subclass 309 visa who has also applied for that visa must satisfy the public interest criteria specified by paragraph 309.228(1)(a); the public interest criteria specified by paragraph 309.228(1)(b) for those secondary applicants who had turned 18 at the time of application; and where the person has previously been in Australia, the special return criteria specified by paragraph 309.228(1)(c).

This amendment is consequential to the amendment made by item [6] below.

### **Item [5] – Clause 309.321 of Schedule 2**

This item amends clause 309.321 of Schedule 2 to the Migration Regulations by omitting the chapeau ‘The applicant’ and inserting subclauses 309.321(1) and (2).

New subclause 309.321(1) provides that an applicant seeking to satisfy the secondary criteria must meet the requirements of either subclause 309.321(2) or subclause 309.321(3). This is a technical amendment, necessary to support the insertion of new subclause 309.321(3), such that a visa applicant may satisfy clause 309.321 (as amended) by meeting the requirements of either subclause 309.321(2) or 309.321(3).

Subregulation 309.321(2) incorporates the existing clause 309.321 in its entirety. Most applicants for a Subclass 309 (Partner (Provisional)) visa seeking to satisfy the secondary criteria will continue to be required to be a member of the family unit of the person who satisfied the primary criteria.

### **Item [6] – At the end of clause 309.321 of Schedule 2**

This item inserts new subclause 309.321(3) of Schedule 2 to the Migration Regulations, which creates a new pathway for certain visa applicants who are children of the primary applicant, but who are no longer young enough to meet the definition of a member of the family unit of the primary applicant.

The definition of ‘member of the family unit’ under regulation 1.12 of the Migration Regulations includes an age limit relating to who is considered to be a ‘child’ of another person (the family head, who is generally the primary applicant for a visa) unless the child is “incapacitated for work”. The general rule is that a child must be either under 18, or under 23 and dependent on the family head, or



wholly reliant on the family head due to incapacitation for work as a result of the total or partial loss of the person's bodily or mental functions.

An applicant who is dependent on the primary applicant would meet the requirements of new subclause 309.321(3) if:

- the applicant made a combined application with the primary applicant; and
- the sponsor of the person who met the primary criteria has at any time been an unauthorised maritime arrival and was an Australian permanent resident at the time the combined application was made.

The intention of this change is to ensure that a specific cohort of secondary visa applicants can continue to satisfy the criteria for the Subclass 309 visa despite having aged beyond the age limit requirement within the general definition of 'member of the family unit', where this has occurred as a result of processing delays beyond their control. The specific cohort refers to those applicants affected by the de-prioritisation of partner visa applications made by an applicant sponsored by a permanent resident who arrived in Australia as an unauthorised maritime arrival under Ministerial Direction 80 (which was revoked on 9 February 2023).

#### **Item [7] – In the appropriate position in Schedule 13**

This item inserts new Part 129 of Schedule 13 to the Migration Regulations, which provides for the operation of amendments made by this instrument.

New clause 12901 of Schedule 13 to the Migration Regulations provides that the amendments made by Schedule 1 to the *Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024* apply in relation to an application for a visa made, but not finally determined, before 9 February 2023. This provision makes clear that the amendments made by Schedule 1 to the Amendment Regulations apply to an application which is made but not finally determined, before 9 February 2023.