

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Bridging Visas) 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 (Bridging Visas) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to clarify the circumstances in which the Minister may grant a Bridging R (Class WR) visa (BVR) without application to certain eligible non-citizens who may be unlawful non-citizens at the time of grant, or who already hold a visa other than a substantive visa, a criminal justice visa or an enforcement visa.

The grant of BVRs is an essential tool in the management of non-citizens released from immigration detention following the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 on 8 November 2023. NZYQ-affected non-citizens are granted a BVR to manage their immigration status and ensure that they are subject to appropriate and enforceable visa conditions while in the Australian community. In practice, this means that an individual may need to be granted further BVRs to allow for the imposition of certain visa conditions to be adapted to reflect the individual's changing circumstances.

Before the commencement of the Amendment Regulations, the Migration Regulations allowed for the grant of a BVR without application to an eligible non-citizen as follows:

- regulation 2.25AA provided for the *initial grant of a BVR* to an eligible non-citizen who is an unlawful non-citizen;
- regulation 2.25AB provided for the *grant of a further BVR* to an eligible non-citizen who holds a BVR – effectively providing for a replacement BVR to be granted to that non-citizen in circumstances where the Minister decides that it is appropriate to impose, or vary the imposition of, certain visa conditions for the purposes of community protection.

The Amendment Regulations remove the requirement contained in regulation 2.25AB for a person to already hold a BVR before they may be granted a further BVR. This allows regulation 2.25AB to operate as a standalone provision under which eligible non-citizens in the NZYQ-affected cohort may be granted either an initial BVR following their release from immigration detention as an unlawful non-citizen, or a subsequent BVR where they are in the

community. As amended, regulation 2.25AB is available to grant a BVR to an NZYQ-affected non-citizen so long as they do not hold a substantive visa, enforcement visa or criminal justice visa. This amendment simplifies and enhances the effective administration of the BVR scheme.

In particular, the Amendment Regulations:

- amend regulation 2.04 to confirm that, while the circumstances in which a visa may be granted are generally set out in Schedule 2 to the Regulations, this is subject to other provisions of the Regulations that may deal with the circumstances applicable to grant (such as subregulation 2.25AB(2)); and
- amend regulation 2.25AB to remove the requirement to hold a BVR to be eligible for grant of a further BVR under this regulation, and replace this with a requirement for the Minister to be satisfied that the non-citizen does not hold a substantive visa, a criminal justice visa or an enforcement visa to be eligible for grant of a BVR under this regulation.

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 Department has consulted other Commonwealth agencies in the course of developing the Amendment Regulations. This accords with section 17 of the *Legislation Act 2003* (the Legislation Act).

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 OIA24-07192.

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

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

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

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;
- subsection 41(1) of the Migration Act provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.
- Section 73 of the Migration Act provides that if the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant a bridging visa permitting the non-citizen to remain in, or to travel to, enter and remain in Australia:
 - (a) during a specified period; or
 - (b) until a specified event happens.

Statement of Compatibility with Human Rights

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

Migration Amendment (Bridging Visas) 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 (Bridging Visas) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (Migration Regulations) to clarify when a temporary bridging visa known as a Bridging R (Class WR) (Subclass 070 Bridging (Removal Pending) visa) (a BVR) may be granted to certain non-citizens who are in Australia.

The grant of BVRs is an essential tool in the management of non-citizens released from immigration detention following the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (S28/2023) on 8 November 2023 (the NZYQ-affected cohort) and those in similar circumstances in the future.

The NZYQ-affected cohort is made up of people who have been refused grant of a visa, or had their visa cancelled, and who are on a pathway for removal from Australia in accordance with the *Migration Act 1958* (Migration Act), but who have no real prospect of removal becoming practicable in the reasonably foreseeable future. Of the current known cohort, the majority were refused a visa, or had their visa cancelled, on character grounds. Others in the cohort had their visa cancelled on other grounds, but had not previously been granted a bridging visa due to risks they present to the Australian community.

The objective of the amendments in the Amendment Regulations is to clarify when the Minister may grant BVRs to members of the NZYQ-affected cohort.

The amendments maintain the existing requirement in the Migration Regulations that the person is a member of that cohort, that is, a non-citizen who has no real prospect of removal becoming practicable in the reasonably foreseeable future. The amendments have the effect that such a person may be granted a BVR under regulation 2.25AB, whether a first BVR or a subsequent BVR, if they are an unlawful non-citizen or hold a bridging visa (whether a BVR or another type of bridging visa). The amendments clarify that the power to grant a BVR does not extend to non-citizens living lawfully in the community on a substantive visa, or to holders of criminal justice or enforcement visas.

Human rights implications

To the extent that the amendments may mean that additional persons in the NZYQ-affected cohort may be granted a BVR than previously, this may engage and limit human rights, including those relating to privacy, freedom of movement and freedom of association, depending on which conditions are imposed on the person's BVR. The human rights implications of the conditions that are or may be imposed on a BVR are explained in the

Statements of Compatibility accompanying the amendments to both the Migration Act and the Migration Regulations following the High Court’s decision in *NZYQ*.¹

Conclusion

The measures in this Disallowable Legislative Instrument are compatible with human rights as, to the extent that they may limit human rights for some additional members of the NZYQ-affected cohort, those limitations are reasonable, necessary and proportionate to the legitimate aim of protecting community safety.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

¹ *Migration Amendment (Bridging Visa Conditions) Bill 2023* – [Explanatory Memorandum](#) and [Supplementary Explanatory Memorandum](#); *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023* – [Explanatory Memorandum](#); and *Migration Amendment (Bridging Visa Conditions) Regulations 2023* – [Explanatory Statement](#).

Details of the Migration Amendment (Bridging Visas) Regulations 2024

Section 1 – Name

This section provides that the title of the Regulations is the *Migration Amendment (Bridging Visas) Regulations 2024*.

Section 2 – Commencement

This section provides for the Regulations to commence the day after registration.

Section 3 – Authority

This section provides that the *Migration Amendment (Bridging Visas) Regulations 2024* are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Item [1] – Regulation 2.04

This item omits the words “the Act” and replaces them with the phrase “the Act and subject to other provisions of these Regulations”.

This amendment clarifies that, while the circumstances in which a visa may be granted are generally set out in Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations), this is subject to other provisions of the Regulations that may deal with the circumstances applicable to grant (such as subregulation 2.25AB(2)).

Item [2] – Subregulation 2.25AB(1)

This item repeals and substitutes current subregulation 2.25AB(1).

Subregulation 2.25AB(1) previously provided that regulation 2.25AB applies to a non-citizen who is both:

- an eligible non-citizen under subregulation 2.20(18), being an NZYQ-affected non-citizen; and
- the holder of a Bridging R (Class WR) visa (BVR).

As amended, subregulation 2.25AB(1) provides that the only requirement for regulation 2.25AB to apply to a non-citizen is that the non-citizen is an eligible non-citizen under subregulation 2.20(18). It is no longer a requirement for the non-citizen to also hold a

BVR for regulation 2.25AB to be available to the Minister to grant the non-citizen a BVR without application.

The repeal of this requirement allows regulation 2.25AB, as amended, to apply to an NZYQ-affected non-citizen regardless of whether they are an unlawful non-citizen or the holder of a BVR. This amendment complements the amendment in Item [2], which deals with the matters of which the Minister is to be satisfied in order to grant a BVR without application to an NZYQ-affected non-citizen.

Item [3] – Subregulation 2.25AB(2)

This item omits the requirement that the non-citizen continue to hold a BVR visa at the time of decision, substituting it with a requirement for the Minister to be satisfied that the non-citizen does not hold a substantive visa, a criminal justice visa or an enforcement visa. The purpose of this amendment is to simplify the legislative framework for the grant of BVRs to NZYQ-affected non-citizens and support the effective administration of the BVR scheme.

Removing the requirement to already hold a BVR at time of decision means that Regulation 2.25AB is available to grant either an initial or subsequent BVR to an NZYQ-affected non-citizen, so long as the non-citizen is not the holder of a substantive visa, a criminal justice visa or an enforcement visa. This reflects the intention that a BVR should not be granted without application to the holder of any visa other than a bridging visa. Subsection 5(1) of the Act provides that a ‘substantive visa’ is any visa other than a bridging visa, a criminal justice visa, or an enforcement visa, so it is necessary to specifically exclude the latter two visas in addition to substantive visas.

The effect of this amendment is to make regulation 2.25AB available to grant a BVR to an NZYQ-affected non-citizen who is an unlawful non-citizen or the holder of a bridging visa, including a BVR.

Item [4] – In the appropriate position in Schedule 13

This item inserts new Part 130 – Amendments made by the *Migration Amendment (Bridging Visas) Regulations 2024* in Schedule 13 (Transitional Arrangements) in the Migration Regulations. New Part 130 has one item (13001), which provides for the operation of these amendments.

The effect of the provision is that the amendments in Schedule 1 to the Regulations apply to the grant of a visa on or after commencement of the Regulations.