

EXPLANATORY STATEMENT

Select Legislative Instrument No. 65, 2014

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014

Subsection 504(1) of the *Migration Act 1958* (the Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the 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 Act.

In addition, regulations may be made pursuant to the provisions of the Act listed in Attachment A.

The purpose of the *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014* (the Regulation) is to amend the *Migration Regulations 1994* (the Principal Regulations) to repeal four visa classes and eight visa subclasses that provide for permanent residence in Australia, and make associated consequential amendments to the Principal Regulations.

In particular, the Regulation amends the Principal Regulations to:

- repeal the Aged Dependent Relative visa classes and subclasses. These visa categories cater for a person who is single, meets the aged requirements and both is, and has for a reasonable period been, financially dependent on their Australian relative;
- repeal the Remaining Relative visa classes and subclasses. These visa categories cater for a person whose only near relatives are those usually resident in Australia;
- repeal the Carer visa classes and subclasses. These visa categories cater for a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a long-term or permanent medical condition;
- repeal the Parent and Aged Parent visa classes and subclasses. These visa categories cater for a person who is the parent of an Australian citizen, Australian permanent resident or eligible New Zealand citizen and where the parent does not pay a significant financial contribution towards their own future health, welfare and other costs in Australia.

The effect of these amendments is that persons are no longer able to apply for these visa classes from 2 June 2014. Applications already made before 2 June 2014 continue to be assessed under the regulations applicable to their application.

The purpose of the amendments is to enable the Government to focus the Family Migration Programme on close family, that is, partners and children, and parents who contribute financially to their own migration and settlement (through the Contributory Parent visa category). This amendment also progresses the Government's simplification and deregulation initiative by repealing four visa classes and eight visa subclasses.

A Statement of Compatibility with Human Rights (the Statement) has been completed, in accordance with *Human Rights (Parliamentary Scrutiny) Act 2011*, for each of the Schedules to the Regulation. The Statement's overall assessment is that the Regulation is compatible with human rights. A copy of the Statement is at Attachment B.

Details of the Regulation are set out in Attachment C.

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

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. A short form RIS has been prepared by the Department. The OBPR assessed the proposal as having no regulatory impact on business, community organisations or individuals and compliance costs are quantified as nil. The OBPR consultation reference is: 16352.

The department undertook national public consultations with a wide range of stakeholders. Australia's current economic and demographic trends along with labour market demand projections and the supply challenges were discussed in the context of setting the size and composition of the 2014-15 Migration Programme.

External stakeholders including employers, business, community groups and state/territory governments have been formally engaged through state/territory public consultations held nationwide to discuss the size and composition of the 2014-15 Migration Programme.

At the Sydney consultation meeting stakeholders expressed concerns around the limited availability of Family Stream places. They also noted that the lengthening processing times across all categories of the Family Stream are having a negative impact on Australians trying to reunite with their close family members, particularly partners and children.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on 2 June 2014.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the 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 Act.

In addition, the following provisions of the Act may apply:

- Subsection 29(3), which relevantly provides that a visa to travel to, enter and remain in Australia may be one to:
 - travel and enter Australia during a prescribed or specified period; and
 - if, and only if, the holder travels to and enters during that period:
 - remain in it during a prescribed or specified period or indefinitely; and
 - 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(1), which provides that there are to be prescribed classes of visas;
- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;
- subsection 31(5), which provides that a visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that 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;
- subsection 41(3), which provides that in addition to any conditions specified under subsection 41(1), the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purposes of this subsection;

- Section 45A, which provides that a non-citizen who makes an application for a visa is liable to pay a visa application charge if, assuming the charge were paid, the application will be a valid visa application;
- Subsection 45B(1), which provides that the amount of the visa application charge is the amount, not exceeding the visa application charge limit, prescribed in relation to the application. The visa application charge limit is determined under the *Migration (Visa Application) Charge Act 1997*;
- Section 45C, which deals with regulations about the visa application charge. In particular:
 - subsection 45C(1) of the Act, which provides that regulations may provide that the visa application charge may be payable in instalments, and specify how those instalments are to be calculated and when instalments are payable; and
 - paragraph 45C(2)(a) of the Act, which relevantly provides that the regulations may make provision for and in relation to various matters, including the recovery of the visa application charge in relation to visa applications and the way, including the currency, in which visa application charge is to be paid;
- Subsection 46(2)(a), which provides that, subject to subsection 46(2A), an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of this subsection;
- Subsection 46(2)(b), which provides that, subject to subsection 46(2A), an application for a visa is valid if under the regulations, the application is taken to have been validly made;
- Section 73, which 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, during a specified period or until a specified event happens;
- Subsection 82(7A), which provides that a bridging visa permitting the holder to remain in, or travel to, enter and remain in, Australia until a specified event happens, ceases to be in effect the moment the event happens;
- Subsection 140H(1), which provides that a person who is or was an approved sponsor must satisfy the sponsorship obligations prescribed by the regulations;

The following provisions of the *Migration (Visa Application) Charge Act 1997* may also apply:

- Section 4, which provides that a visa application charge payable under section 45A of the Act is payable; and
- Section 5, which provides for the visa application charge limit and for its method of calculation in later financial years.

Statement of Compatibility with Human Rights

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

Closure of the Other Family and Non-contributory Parent visa categories

This 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 Legislative Instrument

This Legislative Instrument amends Part 1 and Schedules 1 and 2 to the *Migration Regulations 1994* (the Regulations) to provide for the repeal of the following classes of visa from 2 June 2014:

- Parent (Migrant) (Class AX); Subclass 103
- Aged Parent (Residence) (Class BP); Subclass 804
- Other Family (Migrant) (Class BO); Subclass 114, 115 and 116
- Other Family (Residence) (Class BU); Subclass 835, 836 and 838

Applications on-hand and received up to this date, for these classes, will continue to be processed in accordance with the regulations in force immediately before 2 June 2014 and in accordance with applicable planning levels in future years.

Australia's obligations under the seven key international human rights treaties apply to people subject to Australia's jurisdiction. This is consistent with General Comments by the Human Rights Committee when interpreting the International Covenant on Civil and Political Rights (ICCPR) '*The Position of Aliens under the Covenant*' when the Committee stated:

'The Covenant does not recognise the right of aliens to enter or reside in the territory of a State party. It is a matter for the State to decide who will admit to its territory.'

As a result, the repeal of many of the above subclasses granted offshore does not invoke Australia's jurisdiction insofar as the visa applicant is affected. The repeal of these visas will allow the Government to focus the family stream of the Migration Programme on the entry of close family members, that is, partners, children and those parents who are able to contribute to the cost of their migration and settlement in Australia. It is also consistent with the Government's commitment to ensure that skilled people comprise at least two-thirds of the Migration Programme. Skilled migrants have the lowest rate of unemployment and the strongest English skills – key drivers of successful labour market participation and integration into society.

Human rights implications

Repeal of Parent (Migrant) (Class AX)

The repealing of parent visas may be considered to engage Article 2(2) of International Covenant on Economic, Social and Cultural Rights (ICESCR) on the basis of 'other status' (wealth or capacity to pay) when viewed in conjunction with the maintenance of contributory parent visas. Under article 2(1) of ICESCR, a country is obliged to take steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation' of the rights recognised in ICESCR. Article 2(2) provides that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment No. 20, the Committee stated:

A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2.

Under international human rights law, not every differentiation of treatment will constitute discrimination. The principle of legitimate differential treatment allows State parties to treat particular groups differently, provided particular criteria are met. As noted by the Committee in its General Comment No. 20 (*Non-discrimination in economic, social and cultural rights*, E/C.12/GC/2009, 2 July 2009):

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

The UN Committee on Economic Social and Cultural Rights (Committee) has stated that this provision is 'a necessary flexible device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights' (General Comment 3 - *The nature of States parties obligations (Art. 2, par. 1)*, UN Doc E/1991/23, 14 December 1990).

Please note that a similar article is present in the ICCPR at article 2 (1). The below commentary can apply to an analysis for Article 2(1) of the ICCPR for differential treatment.

As previously stated in the overview of this document, the repeal of the parent visa will allow the Government to focus the family stream of the Migration Programme on the entry of close family members, that is, partners, children and those parents who are able to contribute to the cost of their migration and settlement in Australia.

By repealing the parent visa and continuing to allow parents to apply for contributory parent visas, parents and their families in Australia are asked to make a contribution toward their future costs, including welfare, health, aged care and pharmaceutical benefits. Parents may also access generous Visitor visa arrangements which provide for stays of up to 12 months. For many families this provides flexibility without waiting for many years in a queue for a permanent visa.

The government is of view that while this instrument engages the right of non-discrimination, the repealing of parent visas are designed to achieve a legitimate objective being a migration programme which Australia can afford and in accordance with government policy to ensure that skilled people comprise at least two-thirds of the Migration Programme. This amendment is proportionate and reasonable in achieving its objective by continuing to facilitate visas for close family members and flexible temporary options for parents.

Repeal of Aged Parent (Residence) (Class BP):

The repeal of the Aged Parent Visa may be considered to engage Article 2(2) of ICESCR and Article 2(1) of the ICCPR on the basis of 'other status' (Age). Noting that differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective, the government views the differential treatment as both reasonable and proportionate for same reasons detailed above in regards to the parent visas.

Repeal of Other Family (Residence) (Class BU) and Other Family (Migrant)(Class BO):

The visas within these classes include the Remaining Relative Visa, Carer Visa and Aged Dependent Relative Visa. The Other Family visas provide for the migration of more distant family members in limited circumstances. Current applicants can expect to wait between four and 16 years for a visa. In relation to the Carer visa, this visa is only intended to be used when other forms of care (i.e. hospital, nursing and community services) cannot reasonably be accessed in Australia.

The repeal of the Carer visas within this instrument engages Article 12 of the ICESCR, which recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Convention on the Rights of Persons with Disability reiterates that right in Article 25, stating that "persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability." There are four elements to this right elucidated in General Comment 14 of the ICESCR, that state that health care must be available, accessible, acceptable and of a sufficient quality. The National Disability Insurance Scheme and expanding network of disability support services meet those four elements. Other forms of care (such as hospital access, nursing and community services) which the Carer visa was intended to be used to fill gaps in can now be

reasonably accessed throughout Australia. Additionally, more flexible Visitor visa arrangements are available for the relatives of permanent residents to provide short-term care.

The repealing of Remaining Relative Visa and Aged Dependent Relative Visas demonstrate that the government's policy to focus the family stream of the Migration Programme on the entry of close family members, that is, partners, children and those parents who are able to contribute to the cost of their migration and settlement in Australia. For the aforementioned reasons, this is a legitimate objective and repealing these visas is a reasonable and proportionate measure to achieve this objective, particularly when considered in light of the generous visitor visa framework in place for relatives overseas.

Conclusion

While the legislative changes to the Regulations engage some of the rights articulated in the seven core human rights treaties, these changes are considered reasonable, necessary and proportionate in achieving its objectives.

The Hon. Scott Morrison MP, Minister for Immigration and Border Protection

Details of the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on 2 June 2014.

The purpose of this section is to provide for when the amendments made by the Regulation commence.

Section 3 – Authority

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

The purpose of this section is to set out the Act under which the Regulation is made.

Section 4 – Schedule(s)

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

The purpose of this section is to provide for how the amendments in the Regulation are to operate.

Schedule 1 – Amendments relating to Migration Regulations 1994

Item 1 – Regulation 1.03 (definitions of *aged dependent relative*, *carer* and *remaining relative*)

This item repeals these definitions from the *Migration Regulations 1994* (the Principal Regulations).

These definitions are redundant as this Regulation repeals visa subclasses 114 and 838 (Aged Dependent Relative), 116 and 836 (Carer) and 115 and 835 (Remaining Relative). These terms are only used in the repealed subclasses.

Item 2 – Regulations 1.15, 1.15AA and 1.20K

This item repeals regulations 1.15, 1.15AA and 1.20K from the Principal Regulations.

Regulation 1.15 provides an expanded definition of the term “remaining relative”. This definition is redundant as the associated subclass 115 is repealed by item 6 of this Regulation. It has no other application other than in relation to the repealed subclass.

Regulation 1.15AA provides an expanded definition of the term “carer”. This definition is redundant as the associated subclass 116 is repealed by item 6 of this Regulation. It has no application other than in relation to the repealed subclass.

Regulation 1.20K relates to limitations on sponsorships for a subclass 115 (Remaining Relative) visa. This provision is redundant as the associated subclass 115 is repealed by item 6 of this Regulation.

Item 3 – Regulation 1.20LAA (heading)

This item amends the heading to regulation 1.20LAA to remove references to the parent, aged dependent relative and aged parent visas. References to these visas are redundant as these visas are repealed by item 6 of this Regulation.

Item 4 – Paragraphs 1.20LAA(1)(a), (b), (e) and (f)

This item repeals paragraphs 1.20LAA(1)(a), (b), (e) and (f) of the Principal Regulations.

Subregulation 1.20LAA imposes limitations on sponsorships for certain visas. The repealed provisions are redundant as they relate to visa subclasses that are repealed by item 6 of these Regulations.

Item 5 – At the end of Schedule 13

This item inserts new Part 30 into Schedule 13 to the Principal Regulations. Schedule 13 contains transitional provisions.

The purpose of item 3001 is to:

- provide that applications for the repealed visas cannot be made on or after 2 June 2014 (unless the application is taken to have been made under regulation 2.08 or 2.08A); and
- provide that, for an application taken to have been made under regulation 2.08 or 2.08A on or after 2 June 2014, the Regulations as in force immediately before 2 June 2014 and applicable to those applications will continue to apply; and
- clarify that the Regulations as in force immediately before 2 June 2014 also continue to apply on and after 2 June 2014 in relation to an application for a visa made, but not finally determined, before 2 June 2014.

The Regulations as in force immediately before 2 June 2014 include all regulations in force immediately before 2 June 2014, including transitional provisions and provisions saved by transitional provisions.

The Regulations as in force immediately before 2 June 2014 and which continue to apply to applications made, but not finally determined, before 2 June 2014, may be amended in future in relation to applications made, but not finally determined, before 2 June 2014.

Item 6 – Amendments of listed provisions - repeals

This item repeals the following visa classes and subclasses from the Principal Regulations:

- Class BO - Other Family (Migrant) – Item 1123A of Schedule 1;
- Class BU - Other Family (Residence) – Item 1123B of Schedule 1;
- Class AX - Parent (Migrant) – Item 1124 of Schedule 1;
- Class BP - Aged Parent (Residence) – Item 1124A of Schedule 1;
- Subclass 103 – Parent visa;
- Subclass 114 – Aged Dependent Relative visa;
- Subclass 115 – Remaining Relative visa;
- Subclass 116 – Carer visa;
- Subclass 804 – Aged Parent visa;
- Subclass 835 – Remaining Relative visa;
- Subclass 836 – Carer visa; and
- Subclass 838 – Aged Dependent Relative visa.

The effect of these amendments is that persons are no longer able to apply for these visa classes from 2 June 2014. Applications already made before 2 June 2014 continue to be assessed under the regulations applicable to their application.

The purpose of the amendments is to enable the Government to focus the Family Migration Programme on close family, that is, partners and children, and parents who contribute financially to their migration and settlement. This amendment also progresses the Government's simplification and deregulation initiative by repealing four visa classes and eight visa subclasses.