

## **EXPLANATORY STATEMENT**

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

*Immigration (Education) Act 1971*  
*Migration Act 1958*

*Migration Legislation Amendment (English Tuition) Regulations 2021*

The purpose of this instrument is to amend the *Immigration (Education) Regulations 2018* (the Immigration (Education) Regulations) and the *Migration Regulations 1994* (the Migration Regulations) to update references and provisions consequential to amendments made to the *Immigration (Education) Act 1971* (the Immigration (Education) Act) by the *Immigration (Education) Amendment (Expanding Access to English Tuition) Act 2020* (the amending Act).

The Immigration (Education) Act is an Act relating to the provision of certain courses of instruction for immigrants and certain other persons.

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.

Section 13 of the Immigration (Education) Act provides that the Governor-General may make regulations, not inconsistent with the Immigration (Education) Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Immigration (Education) Act.

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:

- paragraph 4D(6)(a) of the Immigration (Education) Act, which provides that the regulations may prescribe the matters to which the Secretary must have regard in considering whether there are compelling and compassionate reasons why a person's eligibility to receive English course should be extended to more than five years;
- paragraph 5(2)(b) of the Migration Act, which provides that a person has functional English at a particular time if the person provides the Minister with evidence of the person's English language proficiency prescribed in the regulations; and
- paragraph 45C(2)(b) of the Migration Act, which provides that the regulations may make provision for the refund of the visa application charge.

The *Migration Legislation Amendment (English Tuition) Regulations 2021* (the Regulations):

- make consequential amendments to the Immigration (Education) Regulations following removal of the limit of 510 hours on the Commonwealth's obligation to provide English courses under the Immigration (Education) Act;

- update provisions of the Migration Regulations for the refund, in certain circumstances, of the second instalment of the visa application charge paid by relevant applicants who do not commence an approved English course for which they are eligible under the Immigration (Education) Act; and
- update the prescribed evidence of functional English for the purposes of the Migration Regulations to take account of the fact that providers of approved courses under the Immigration (Education) Act will no longer be making determinations that a person has functional English.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. Providing for these details to be in delegated legislation rather than primary legislation allows flexibility to adjust administrative provisions as necessary and appropriate from time to time. The authorising Acts expressly provide for these matters to be prescribed, as can be seen in the provisions listed above.

Providing for these matters in delegated legislation has been the consistent practice of the Government of the day. The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. On 1 October 2018, the Immigration (Education) Regulations replaced the *Immigration (Education) Regulations 1992*, which sunsetted on that date pursuant to section 50 of the *Legislation Act 2003* (the 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. 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 43332.

In addition to the OBPR, a range of relevant agencies were consulted including the Department of Education, Skills and Employment and the Department of Finance.

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

The Regulations commence at the same time as Schedule 1 to the *Immigration (Education) Amendment (Expanding Access to English Tuition) Act 2020*.

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

The Immigration (Education) Act and the Migration Act specify no conditions that need to be satisfied before the powers to make the Regulations may be exercised.

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

**Statement of Compatibility with Human Rights**

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

***Migration Legislation Amendment (English Tuition) Regulations 2021***

The *Migration Legislation Amendment (English Tuition) Regulations 2021* 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 of the Disallowable Legislative Instrument**

The purpose of this Disallowable Legislative Instrument is to amend the *Migration Regulations 1994* (the Migration Regulations) and the *Immigration (Education) Regulations 2018* (the Immigration (Education) Regulations) to update references and provisions consequential to amendments made to the *Immigration (Education) Act 1971* (the IE Act) by the *Immigration (Education) Amendment (Expanding Access to English Tuition) Act 2020* (the IE Amendment Act).

The IE Act relates to the provision of certain courses of instruction for migrants and certain other persons. This includes the provision of English courses. The IE Act sets out who is eligible and ineligible for English courses, as well as time limits for registration, commencement and completion. The IE Act also establishes the Minister's obligation to provide or arrange the provision of tuition in an approved English course to certain eligible persons.

The IE Amendment Act, which received the Royal Assent on 17 December 2020, makes the following amendments to the IE Act:

- changing the upper limit for eligibility to access English tuition from 'functional English' to a new level of 'vocational English';
- removing the 510 hour statutory limit on an eligible person's entitlement to English tuition;
- removing the statutory time limits of up to 12 months for registering for, commencing and completing English tuition for certain people who held a visa and were in Australia on or before 1 October 2020; and
- allowing for the provision of English tuition to certain visa holders or visa applicants outside Australia, to support their English language learning in preparation for their migration to Australia.

This Disallowable Legislative Instrument, which commences at the same time as these amendments made by the IE Amendment Act, amends the Immigration (Education) Regulations and Migration Regulations to align them with the amendments to the IE Act by:

- updating provisions of the Migration Regulations for the refund, in certain circumstances, of the second instalment of the visa application charge paid by relevant applicants who do not commence an approved English course for which they are eligible under the IE Act;
- updating the prescribed evidence of functional English for the purposes of the Migration Regulations to take account of the fact that providers of approved courses

under the IE Act will no longer be making determinations that a person has functional English; and

- making consequential amendments to the Immigration (Education) Regulations following removal of the limit of 510 hours on the Commonwealth's obligation to provide English courses under the IE Act.

Regulation 2.12H of the Migration Regulations relates to refunds of the second instalment of the Visa Application Charge (VAC), an amount that must be paid for a visa application in relation to some visas. The VAC is payable in two instalments: the 'first instalment' is payable at the time the visa application is made and the 'second instalment' (or second VAC) is payable before the grant of the visa. Some visas require that for the visa to be granted, the visa applicant must provide prescribed evidence that they have 'functional English'. If they cannot provide this prescribed evidence, they must pay a second VAC.

Refunds of the second VAC are available in certain circumstances where the visa holder does not commence English tuition while there is an obligation for the person to be provided with English tuition. Before the IE Act was amended, the obligation to be provided with English tuition ceased if the person did not register for or commence English tuition within 12 months of their visa commencement date, so a refund was only available during that time. The effect of the amendments to the IE Act is that for visa holders who were in Australia on or before 1 October 2020 there is no longer a time limit to commence English tuition. This Disallowable Legislative Instrument amends the refund provisions to maintain the status quo. That is, for those visa holders who were in Australia on or before 1 October 2020, and who will now benefit from the removal of this time limit to commence English tuition, a refund is still only available if the specified circumstances occur within 12 months of their visa commencement date. The time limit of 12 months for registration and commencement still applies to those visa holders who become eligible after 1 October 2020. The Disallowable Legislative Instrument also updates references to relevant provisions of the IE Act in regulation 2.12H where these references have been amended by the IE Amendment Act.

This Disallowable Legislative Instrument also amends regulation 5.17 of the Migration Regulations to remove a reference to a person being assessed as having 'functional English' by a provider of an approved English course for the purposes of the IE Act. Repealed paragraph 5.17(f) provided that prescribed evidence of a person's English language proficiency for the purposes of the *Migration Act 1958* and the Migration Regulations included evidence that the person has been assessed as having functional English by the provider of an approved English course for the purposes of section 4 of the IE Act. Apart from the term 'functional English' no longer being used in the IE Act, this way of providing evidence has become redundant as evidence of English for the purposes of a visa application, where required, is usually provided by way of a proficiency test, or by the other ways in regulation 5.17 which remain the same apart from consequential changes.

Finally, this Disallowable Legislative Instrument makes consequential amendments to paragraph 9(d) of the Immigration (Education) Regulations to remove references to 510 hours of English tuition following removal of the limit of 510 hours on the Commonwealth's obligation to provide English courses made by the amendments to the IE Act.

### **Human rights implications**

The amendments made by this Disallowable Instrument are largely technical and consequential in nature to the amendments made by the IE Amendment Act and do not themselves engage any of the applicable rights or freedoms.

### **Conclusion**

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon Alex Hawke MP**

**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

**Details of the Migration Legislation Amendment (English Tuition) Regulations 2021**

**Section 1 - Name**

This section provides that the name of the instrument is the *Migration Legislation Amendment (English Tuition) Regulations 2021*

**Section 2 - Commencement**

This section provides for the *Migration Legislation Amendment (English Tuition) Regulations 2021* to commence at the same time as Schedule 1 to the *Immigration (Education) Amendment (Expanding Access to English Tuition) Act 2020*.

**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 the operation of the amendments made by the Regulations. It provides that an instrument specified in a Schedule to the Regulations is amended or repealed as set out in the Schedule concerned, and any other item in a Schedule has effect according to its terms. In Schedule 1, the only Schedule to the Regulations, the specified instruments are the *Immigration (Education) Regulations 2018* (the Immigration (Education) Regulations) and the *Migration Regulations 1994* (the Migration Regulations).

**Schedule 1 – Amendments**

*Immigration (Education) Regulations 2018*

Item [1] – Paragraph 9(d)

The Regulations commence at the same time as, and make amendments that are consequential to, Schedule 1 to the *Immigration (Education) Amendment (Expanding Access to English Tuition) Act 2020* (the amending Act), which amends the *Immigration (Education) Act 1971* (the Immigration (Education) Act).

Item 1 of the Regulations repeals paragraph 9(d) of the Immigration (Education) Regulations and substitutes a new paragraph 9(d).

Section 4D of the Immigration (Education) Act imposes a time limit of five years during which the Commonwealth is obliged to provide a person with English language tuition. Following the amendments made by the amending Act, the time limit does not apply to a person who was granted a permanent visa in Australia on or before 1 October 2020 or who first entered Australia as the holder of a permanent visa on or before 1 October 2020.

Subsection 4D(3) provides that a person may apply for an extension of this time limit. Subsection 4D(5) provides that the Secretary may extend the time limit in respect of a person who has applied for an extension if the Secretary is satisfied that there are compelling and compassionate circumstances for doing so.

Regulation 9 of the Immigration (Education) Regulations prescribes the matters to which the Secretary must have regard in considering an application for an extension of the time limit of five years. Previously paragraph 9(d) required the Secretary to have regard to any compelling and compassionate reasons that prevented the person from receiving 510 hours of tuition in an approved English course prior to the application for an extension.

Prior to amendment by the Amending Act, the Immigration (Education) Act imposed a limit of 510 hours on the amount of English language tuition that the Commonwealth was obliged to provide under the Immigration (Education) Act to an eligible person. The amending Act removed this limitation and the reference to 510 hours is no longer appropriate in the context of paragraph 9(d).

New paragraph 9(d) omits the reference and provides that the Secretary must have regard to any other compelling or compassionate reasons that existed during the period that commenced when the person was first granted a permanent visa in Australia, or first entered Australia as the holder of a permanent visa, and ending when the person applied for an extension. The effect of new paragraph 9(d) is that the Secretary must have regard to any compelling and compassionate circumstances that may have arisen from the beginning of the period during which the Commonwealth was obliged to provide the person with English language tuition.

#### *Migration Regulations 1994*

##### Item [2] – Paragraph 2.12H(2)(f)

This item amends paragraph 2.12H(2)(f) of the Migration Regulations to insert the words “within the period of 12 months starting on the applicant’s visa commencement day (within the meaning of the *Immigration (Education) Act 1971*) any of the following events occur” after the words “paragraph and”.

Regulation 2.12H makes provision for the refund, in certain circumstances, of the second instalment of the Visa Application Charge (VAC) payable in respect of an application for some visas.

Paragraph 2.12H(2)(f) prescribes circumstances under which the Minister must refund the amount of a second instalment of the VAC paid under a provision of Schedule 1 to the Migration Regulations that is specified by the Minister in an instrument in writing. The provisions specified for the purposes of this paragraph relate to requirements for payment of a second instalment of the VAC if an applicant for a relevant visa is aged over 18 years and does not have functional English at the time of applying for the visa. The circumstances prescribed in paragraph 2.12H(2)(f) under which the second instalment of the VAC must be refunded relate to circumstances where a person does not commence an approved English course to which the person was entitled under the Immigration (Education) Act (see item 2, below, for further details of the provisions of paragraph 2.12H(2)(f)).

Under the Immigration (Education) Act, after the grant of a visa, or entry to Australia if the visa is granted while the applicant is overseas, these persons are entitled to tuition in an approved English course for a period of time worked out under the Immigration (Education) Act.

Prior to amendment of the Immigration (Education) Act by the amending Act, this entitlement ceased if the person failed to commence an approved English course within 12 months of the person's *visa commencement day*, which is the day the visa is granted if the person was in Australia when the visa was granted, or the day the person first entered Australia as the holder of the visa if the person was overseas when the visa was granted. However, the amendments to the Immigration (Education) Act include a new provision that the requirement that an approved course must be commenced within 12 months of the visa commencement day does not apply to a person whose visa commencement day is on or before 1 October 2020. This means that the entitlement of those persons to tuition in an approved English course could continue even if they failed to commence the course within 12 months.

It is not the intention that the period when a person is eligible for a refund of the second instalment of the VAC if the prescribed circumstances arise would extend beyond the current 12 months for any persons. Therefore this item amends paragraph 2.212H(2)(f) to make it clear that the relevant circumstance must arise within 12 months of the person's visa commencement day.

#### Item [3] – Subparagraphs 2.12H(2)(f)(i) to (iv)

This item repeals subparagraphs 2.12H(2)(f)(i) to (iv) of the Migration Regulations and substitutes new subparagraphs (i) to (iv). Paragraph 2.12H(2)(f) provides for a refund of the second instalment of the VAC if the visa holder does not commence a course of English tuition to which the applicant is entitled under the Immigration (Education) Act, under certain circumstances. As described above under item 1, to be eligible for a refund the person must have failed to commence a course of English language tuition within 12 months of the person's visa commencement day, and the prescribed circumstances must have arisen within those 12 months.

Subparagraphs 2.12H(2)(f)(i) to (iv) all contain references to the Immigration (Education) Act. The purpose of the new subparagraphs is to update the references and to align the operation of the subparagraphs with the current provisions of the Immigration (Education) Act. Details of the new subparagraphs are:

- subparagraph 2.12H(2)(f)(i) provides for a refund of the second instalment if the applicant dies before commencing a course of English language tuition to which the applicant was entitled under the Immigration (Education) Act. The previous subparagraph referred to section 4C of the Immigration (Education) Act. The entitlement is now provided for under section 4B. The new subparagraph updates the reference to that section;
- subparagraph 2.12H(2)(f)(ii) provides for a refund of the second instalment if the applicant's visa was granted and then later cancelled before the applicant commenced a course of English language tuition to which the applicant was entitled under the Immigration (Education) Act. The previous subparagraph referred to section 4C of



the Immigration (Education) Act. The entitlement is now provided for under section 4B. The new subparagraph updates the reference to that section;

- subparagraph 2.12H(2)(f)(iii) provides for a refund of the second instalment if the applicant's visa was granted but ceased to have effect before the applicant commenced a course of English language tuition to which the applicant was entitled under the Immigration (Education) Act. The previous subparagraph referred to section 4C of the Immigration (Education) Act. The entitlement is now provided for under section 4B. The new subparagraph updates the reference to that section; and
- subparagraph 2.12H(2)(f)(iv) provides for a refund of the second instalment if the Minister's obligation under the Immigration (Education) Act to provide tuition in an approved English course ceases because the person has attained the prescribed level of English before the person has received any English language tuition in an approved course. The previous subparagraph referred to the obligation being in section 4C of the Immigration (Education) Act. The new subparagraph updates this to a reference to section 4B where the obligation is now located. The previous subparagraph also referred to the person ceasing to be eligible under paragraph 4D(1)(a) of the Immigration (Education) Act. The new paragraph updates this to a reference to subsection 4A(1)(b) where provision for eligibility to cease due to the person attaining the prescribed level of English is now located. Prior to amendment by the amending Act, the Immigration (Education) Act provided that eligibility for English language tuition ceased when the person attained functional English. Following amendment, the relevant level of English is now vocational English.

#### Item [4] – Subregulation 2.12H(2A)

This item repeals subregulation 2.12H(2A) of the Migration Regulations and substitutes a new subregulation 2.12H(2A).

The purpose of subregulation 2.12H(2A) is to clarify that the provision for a refund of the second instalment under subparagraph 2.12H(2)(f)(iii) does not apply if the Commonwealth's obligation under the Immigration (Education) Act to provide tuition for a person in an approved English course ceased because the person failed to register for or commence a course within the required time, before the person's visa ceased. See the notes on item 2 above for further details of subregulation 2.12H(2)(f)(iii).

Previous subparagraph 2.12H(2)(f)(iii) referred to the obligation to provide tuition in an English course as being in section 4C of the Immigration (Education) Act. New subparagraph 2.12H(2)(f)(iii) updates this reference to section 4B where the obligation is now located. Previous subparagraph 2.12H(2)(f)(iii) also referred to the requirements for a person to register for and commence an approved English course within specified time limits as being in paragraphs 4D(1)(b) and (c) of the Immigration (Education) Act. New subparagraph 2.12H(2)(f)(iii) updates this to references to paragraphs 4C(2)(a) and (b), where the requirements are now located.

#### Item [5] – Paragraph 2.12H(4)(b)

This item omits a reference to “4C” in paragraph 2.12H(4)(b) of the Migration Regulations, and substitutes a reference to “4B”.

This amendment is consequential to the relocation of the relevant provision in the Immigration (Education) Act. See the notes on the amendment of subparagraph 2.12H(2)(f)(i) at item 3, above.

Item [6] – Paragraphs 5.17(f) and (j)

This item repeals paragraphs 5.17(f) and (j) of the Migration Regulations and substitutes a new paragraph 5.17(d).

Repealed paragraph 5.17(f) provided that prescribed evidence of a person's English language proficiency for the purposes of the Migration Regulations included evidence that the person has been assessed as having functional English by the provider of an approved English course for the purposes of section 4 of the Immigration (Education) Act. Amendments to the Immigration (Education) Act made by the amending Act repealed references to functional English and substituted references to vocational English. Providers of approved courses for the purposes for the Immigration (Education) Act will no longer assess a person as having functional English. Paragraph 5.17(f) is therefore inoperative once the changes made by the amending Act commence and, as a result, is repealed.

Repealed paragraph 5.17(j) provided that if other evidence of functional English referred to in paragraph 5.17(a) cannot be provided, and if it is not reasonably practical for a person to attend at a place or at a time for an assessment referred to in paragraph 5.17(f), evidence of a person's functional English includes evidence that the person has been determined by the Minister, on the basis of an interview with the person, to have functional English.

New paragraph 5.17(d) remakes repealed paragraph 5.17(j) omitting the reference to repealed paragraph 5.17(f), to provide that if the evidence referred to in paragraph 5.17(a) cannot be provided by a person, evidence that the person has functional English includes evidence that the person has been determined by Minister, on the basis of an interview with the person, to have functional English.