

**EXPLANATORY STATEMENT**

*Migration Regulations 1994*

**TESTS, SCORES, PERIOD, LEVEL OF SALARY AND EXEMPTIONS  
TO THE ENGLISH LANGUAGE REQUIREMENT FOR  
SUBCLASS 457 (TEMPORARY WORK (SKILLED)) VISAS 2016/026**

*(Subclause 457.223(11))*

1. Instrument IMMI 16/026 is made under subclause 457.223(11) of Schedule 2 to the Regulations.
2. Under subsection 33(3) of the *Acts Interpretation Act 1901*, which states where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
3. Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas Amendment Instrument 2016/026 makes amendments to IMMI 15/028 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirements for Subclass 457 (Temporary Work (Skilled)) Visas 2015
4. The purpose of the Instrument is for the Minister to specify the addition of a class of applicants who are seeking to satisfy the primary criteria for a Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa) who are exempt applicants for the purposes of subclause 457.223(4) of Schedule 2 to the Regulations. The class of applicants consists of applicants who have demonstrated an equivalent or higher level of the English language requirements for a Subclass 457 visa when obtaining a registration, licence or membership required by their nominated occupation.
5. This Instrument is one of a number of measures that gives effect to a recommendation of the 2014 Independent Review into Integrity in the Subclass 457 Programme (the Integrity

Review) to create streamlined processing within the existing 457 programme as a deregulatory measure. In formulating the recommendations, the 457 Integrity Review undertook extensive stakeholder consultations meeting with over 150 organisations and individuals and receiving nearly 200 submissions. While the Instrument does not substantially alter existing arrangements it will be beneficial to business as it eliminates duplication and 'red tape' in relation to English proficiency.

6. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 180006).
7. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided.
8. The Instrument, IMMI 16/026, commences 19 April 2016.

## Statement of Compatibility with Human Rights

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

### ***Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016***

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*.

#### **Schedule 2 – Processing of Subclass 457 visas**

##### **Overview of the measure**

Schedule 2 amends the *Migration Regulations 1994* to give effect to two policy changes relating to the Subclass 457 Temporary Work (Skilled) visa. The amendments:

- adjust the criteria which must be met for an applicant to make a valid application for a Subclass 457 (Temporary Work (Skilled)) visa. The criteria are set out in item 1223A of Schedule 1 to the *Migration Regulations 1994* (the Regulations); and
- adjust the English language criteria which must be met by certain applicants in order for the visa to be granted. The criteria are set out in Schedule 2 to the Regulations.

##### **Criteria for making a valid Subclass 457 visa application**

These amendments simplify provisions and assist in the efficient processing of applications. In order to meet the requirements of item 1223A of Schedule 1 of the Regulations, applicants previously entered an identification number which identified the sponsor or proposed sponsor. This number related to the identity of the sponsor and was not specific to the nomination or proposed nomination. This meant that visa applications were not automatically linked to the relevant nomination at the time the visa application was lodged. This slowed visa processing because the processing officer was required to manually identify the relevant nomination. To address this issue, systems were changed to prevent a visa application from being lodged online unless the visa application identified an approved nomination or an application for approval of a nomination which has not been finalised. To provide legislative authority for this approach, some references in item 1223A to the identity of the sponsor were replaced with references to the nomination. As a result, applicants no longer enter a number linked to the identity of the sponsor, and they instead enter a number linked to the nomination.

##### **English language criteria**

These amendments improve the flexibility and efficiency of the Subclass 457 programme, and simplify requirements for certain visa applicants, by amending the English language criteria for the Subclass 457 visa. Previously, applicants were required to provide evidence of English language proficiency to the Department, via specified test results, even if they were able to demonstrate English proficiency by test results, or by some other means, that was satisfactory to Australian occupational licensing or registration authorities. In circumstances where the registration and licencing authorities impose and assess English language requirements, it is duplication and ‘red tape’ for the Department to require the same or equivalent evidence via specified test results. The amendment repeals a criterion which imposed such a requirement (paragraph 457.223(4)(ea)). In addition, to give full effect to the

policy of reliance on assessment by occupational licensing and registration authorities, it is necessary to amend the instrument under subclause 457.223(11) so that visa applicants are exempt from the Department's English language testing requirements if they have already met the same or higher English language requirements to gain an occupational registration or license. That instrument is amended with effect from the commencement date of this regulation. The changes do not adversely impact English proficiency levels in the 457 programme.

## **Human rights implications**

### Criteria for making a valid Subclass 457 visa application

This amendment has been assessed against the seven core international human rights treaties and it does not engage any of the applicable rights or freedoms.

### English language criteria

This amendment has been assessed against the seven core international human rights treaties. Generally, Australia owes human rights obligations only to those within its territory and/or jurisdiction. The Subclass 457 visa to which this amendment relates may be applied for onshore (i.e. where the applicant is in Australia) or offshore (i.e. where the applicant is outside Australia). Therefore, the human rights implications assessed below are relevant to the extent that they pertain to persons seeking to satisfy the criteria for the grant of a Subclass 457 visa while onshore.

### *Recognition of the right to work – Article 6 of the ICESCR*

As the measure has an impact on the work rights of non-citizens, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is relevant.

Article 6 provides:

*The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

*...only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

It is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated 'work rights' are attached to certain types of visas, including the Subclass 457 visa.

A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The authority from the Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights are lawful as a matter of domestic

law and serve the objectives of maintaining the integrity of Australia's migration programme, ensuring the continued access of Australian citizens and permanent residents to employment, and ensuring that temporary non-citizens are not the subject of exploitation. As such, the proposed amendments are justified in accordance with Article 4 of ICESCR.

*Prohibition on discrimination – Articles 2 and 26 of the International Covenant on Civil and Political Rights*

As the measure purports to discriminate in favour of those exempted, consideration has to be had to whether this engages Article 2 and Article 26 of the International Covenant on Civil and Political Rights (ICCPR).

Article 2 provides:

*Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 2 of the ICESCR reflects the provision relating to discrimination in article 2(1) of the ICCPR.

Article 26 of the ICCPR provides:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee, to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

'Language' is listed in these articles of the ICESCR and the ICCPR as a ground upon which an individual may be discriminated. However, not all treatment that differs among individuals or groups on any of the grounds mentioned above will amount to prohibited discrimination. The UN Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

As outlined above, the purpose of this amendment is to amend the English language exemption provisions of the Subclass 457 programme by providing an exemption to the standard English language requirements for visa applicants who have already met the same or higher English language requirements to gain an occupational registration or license. The main objective of the English language requirement is to ensure that those working and living in Australia have minimum standards of English, which protects the community and applicant in a range of areas such as healthcare and workplace health and safety.

While the measure affects a cohort of applicants differently, it is an administrative measure that will benefit some persons seeking entry to Australia on a Subclass 457 visa by streamlining the current requirements for English language proficiency in certain circumstances. The measure is reasonable and proportionate in achieving a legitimate objective and is therefore compatible with human rights.

## **Conclusion**

These amendments are compatible with human rights as they do not raise any human rights issues.

**The Hon. Peter Dutton MP, Minister for Immigration and Border Protection**