

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

Social Security Act 1991

Social Security Amendment (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2018

Summary

Paragraphs 739A(1)(e) and 739A(4)(b) of the *Social Security Act 1991* (the Act) allow the Minister to determine, by legislative instrument, a class of visas for the purposes of the newly arrived resident's waiting period (NARWP) for special benefit. This instrument determines that a Subclass 309 (Partner (Provisional)) visa and a Subclass 820 (Partner) visa are classes of visas under paragraphs 739A(1)(e) and 739A(4)(b) of the Act.

The effect of this instrument is to clarify that a holder of a Subclass 309 (Partner (Provisional)) visa or a Subclass 820 (Partner) visa is subject to the NARWP for special benefit. It also makes it clear that the NARWP for the holder of a Subclass 309 (Partner (Provisional)) visa or a Subclass 820 (Partner) visa begins on the day the person applied for the relevant visa, and the person does not have to restart or re-serve the NARWP if they are subsequently granted a permanent visa.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make 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 amend such instrument.

Background

Under subsection 739A(1) of the Act, a person is subject to the NARWP for special benefit if they:

- a) enter Australia; or
- b) become the holder of a permanent visa; or
- e) become the holder of a visa that is in a class of visas determined by the Minister for the purposes of paragraph 739A(1)(e) of the Act.

The *Social Security Amendment (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2018* (the Amendment Determination) amends the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015 (No. 2)* (the 2015 Determination) to determine that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are classes of visas for the purposes of paragraph 739A(1)(e) of the Act.

Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visa holders are currently subject to a NARWP once they enter Australia by virtue of paragraph

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739A(1)(a) of the Act, unless they are exempt from the NARWP under subsection 739A(6), (7) or (8) of the Act. The Amendment Determination only clarifies, for the avoidance of doubt, that a person who becomes the holder of such a visa is subject to the NARWP pursuant to paragraph 739A(1)(e) of the Act. The NARWP will therefore continue to apply to these visa subclasses.

These visa subclasses are granted under the family stream of Australia's Migration Program and allow the partner or spouse of an Australian citizen, Australian permanent resident or eligible New Zealand citizen to live in Australia while their application for a permanent Subclass 100 (Partner) or Subclass 801 (Partner) visa is processed.

The application of the NARWP to these visa subclasses reflects the purpose of the NARWP, which is that people seeking to settle permanently in Australia under the family stream are financially independent when they first settle here. Holders of these visa subclasses are expected to be able to support themselves, including through support from their partner or spouse already in Australia.

Further, under subsection 739A(4) of the Act, if a person is subject to a NARWP and the person was the holder of a visa that is in a class of visas determined by the Minister for the purposes of paragraph 739A(4)(b) of the Act, then the NARWP starts on the day the person applied for that visa, and ends when the person has been in Australia for the required period of weeks. This Amendment Determination amends the 2015 Determination to determine that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are classes of visas for the purposes of paragraph 739A(4)(b) of the Act.

Paragraph 739A(4)(b) of the Act is intended to prevent persons who have served all or part of their NARWP for special benefit while in Australia on specified temporary visas from being required to restart or re-serve the NARWP if they are subsequently granted a permanent visa. That is, even if the person is granted a permanent visa, their NARWP continues to be measured from the day on which they applied for the specified temporary visa. The Amendment Determination specifies Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas for this purpose. This reflects that holders of these visas are on a pathway to permanent residency, as these visas are granted to allow the holder to stay in Australia while their application for a permanent partner visa is being processed.

The determination under paragraph 739A(4)(b) of the Act is also picked up for the purposes of the NARWP that applies to certain family payments. The *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018* (the Promoting Sustainable Welfare Act) introduces a NARWP for family tax benefit Part A under the *A New Tax System (Family Assistance) Act 1999* (the FA Act) and for parental leave pay and dad and partner pay under the *Paid Parental Leave Act 2010* (the PPL Act). The Promoting Sustainable Welfare Act amends the FA Act and PPL Act to provide that, where a person has previously held one or more visas determined by the Minister under paragraph 739A(4)(b) of the Act, the NARWP starts on the day the person applied for the last of those visas.

The Amendment Determination therefore also results in Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visa holders who have already served all or part of the NARWP for family tax benefit Part A, parental leave pay or dad and partner pay while on a temporary partner visa not having to restart or re-serve the NARWP if they are granted a permanent visa.

Commencement

The instrument will commence on the later of 1 January 2019 and the day following registration.

Consultation

The Department of Home Affairs was consulted on this Determination to assist with ensuring that the visa classes determined by this Amendment Determination are current. The Department of Human Services was also consulted.

Public consultation was considered unnecessary because this Determination is administrative in nature.

Regulation Impact Statement (RIS)

Following consultation with the Office of Best Practice Regulation (OBPR), a RIS is not required for the proposed amendments in this instrument (OBPR ID 23652).

Explanation of the provisions

Section 1 states that the name of the Amendment Determination is the *Social Security Amendment (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2018*.

Section 2 provides that the Amendment Determination commences on 1 January 2019.

Section 3 provides that the Amendment Determination is made under paragraphs 739A(1)(e) and 739A(4)(b) of the *Social Security Act 1991*.

Section 4 provides for the amendments made in Schedule 1, which amend the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015 (No. 2)*.

Schedule 1 amends the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015 (No. 2)* as set out below.

Item 1 inserts new section 4A after section 4, which determines that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) are classes of visas for the purposes of paragraph 739A(1)(e) of the *Social Security Act 1991*.

Item 2 inserts new section 5A after section 5, which determines that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) are classes of visas for the purposes of paragraph 739A(4)(b) of the *Social Security Act 1991*.

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Statement of Compatibility with Human Rights

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

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Overview of the Legislative Instrument

The *Social Security Amendment (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2018* (the Amendment Determination) is made for the purposes of paragraphs 739A(1)(e) and 739A(4)(b) of the *Social Security Act 1991* (the Act).

The purpose of the Amendment Determination is to:

- clarify that a person who becomes the holder of a Subclass 309 (Partner (Provisional)) or Subclass 820 (Partner) visa is subject to the newly arrived resident's waiting period (NARWP) for special benefit; and
- provide that, where a person holds a Subclass 309 (Partner (Provisional)) or Subclass 820 (Partner) visa and is subsequently granted a permanent visa, the NARWP for certain payments starts from the date the person applied for the temporary partner visa.

Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visa holders are expected to be able to support themselves, including through support from their partner or spouse already in Australia. For this reason, these visa subclasses are subject to a NARWP.

The NARWP already applies to these visa holders by virtue of paragraph 739A(1)(a) of the Act which applies a NARWP to a person who enters Australia. However, for the avoidance of doubt, the Amendment Determination clarifies that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are specified classes of visa and are therefore subject to the NARWP under paragraph 739A(1)(e) of the Act. This is a purely technical change.

The Amendment Determination also specifies Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas as classes of visas for the purposes of paragraph 739A(4)(b) of the Act. Where a person held a visa determined under this paragraph, their NARWP for special benefit begins to run from the day the person applied for that visa. This means that the person does not need to restart or re-serve the waiting period if they are subsequently granted a permanent visa. The same arrangements apply to the NARWP for family tax benefit Part A under the *A New Tax System (Family Assistance) Act 1999* (the FA Act) and for parental leave pay and dad and partner pay under the *Paid Parental Leave Act 2010* (the PPL Act).

Human rights implications

This Amendment Determination engages the following human rights:

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- the right to social security as contained in article 9 under the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right to an adequate standard of living, including food, water and housing as contained in article 11 of the ICESCR and article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the right to maternity leave as contained in article 10(2) of the ICESCR and article 11(2)(b) of the CEDAW;
- the right to respect for the family as contained in articles 23 and 17(1) of the International Covenant on Civil and Political Rights (ICCPR);
- the rights of parents and children as contained in article 3 of the Convention on the Rights of the Child (CRC) and article 24(1) of the ICCPR; and
- the right to equality and non-discrimination as contained in articles 2, 16 and 26 of the ICCPR.

The Amendment Determination is compatible with these human rights. To the extent that a human rights obligation is engaged or limited, the impact is reasonable and proportionate in achieving the objectives of the Amendment Determination and of the NARWP more broadly.

The Amendment Determination will assist Australia to meet its international obligations under the ICCPR, the ICESCR and the CEDAW by providing that people who have already partially or fully served a NARWP for certain welfare payments as a Subclass 309 (Partner (Provisional)) or Subclass 820 (Partner) visa holder do not have to serve another NARWP for these payments if they are subsequently granted a permanent visa.

Right to social security, right to an adequate standard of living, right to maternity leave, right to respect for the family and rights of parents and children

This Amendment Determination engages the above rights to the extent that it concerns the operation of the NARWP for special benefit and family payments which affects a person's access to these payments.

It is longstanding policy and legislation that a NARWP applies to certain welfare payments, including special benefit. The NARWP is designed such that migrants under the skilled and family streams of Australia's Migration Program are financially independent when they first settle in Australia.

To the extent that the application of a waiting period limits the above rights, this is reasonable and proportionate to the objective of the NARWP which is to encourage people seeking to settle permanently in Australia to take steps to provide for their own financial support during their initial settlement period.

This limitation is mitigated through the provision of exemptions from the NARWP such that a safety net remains in place for people in vulnerable circumstances, including because they have experienced a substantial change in circumstances beyond their control since first arriving in Australia.

The Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018 (the Promoting Sustainable Welfare Act) extends the length of

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the existing NARWP for a range of payments, including special benefit. The Promoting Sustainable Welfare Act also applies the NARWP to a broader range of payments, including family tax benefit Part A, parental leave pay and dad and partner pay. The human rights implications of these changes are canvassed in detail in the Statement of Compatibility with Human Rights in the Explanatory Memorandum of the related Bill which is available at: www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r6048.

This Amendment Determination does not alter the types of visa that are subject to the NARWP.

A NARWP for special benefit currently applies to a person if they enter Australia, become the holder of a permanent visa, or become the holder of a specified class of visa under paragraph 739A(1)(e) of the Act. While Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas have not previously been specified for this purpose, holders of these visas are nonetheless subject to a NARWP once they enter Australia as a result of paragraph 739A(1)(a) of the Act.

This Amendment Determination clarifies the application of the NARWP to these visa subclasses by making it clear that they are a specified class of visa. This change does not alter the effect of the existing policy and legislation in relation to the NARWP for special benefit or the associated implications for the rights listed above.

Further, this Amendment Determination does not alter the overall duration of the NARWP. The Promoting Sustainable Welfare Act changes the duration of the NARWP for various payments for those granted a relevant visa on or after commencement. The Amendment Determination provides for when the NARWP is taken to start counting in certain cases.

Where a person holds a visa determined under paragraph 739A(4)(b) of the Act, their NARWP for special benefit begins to run from the day the person applied for that visa, and the person need not restart or re-serve the waiting period if they are subsequently granted a permanent visa. This Amendment Determination specifies Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas as a class of visas for this purpose. This determination is also picked up for the purposes of the equivalent NARWP applied to certain family payments, including family tax benefit Part A, parental leave pay and dad and partner pay.

This provides an extra safeguard that the holder of such a visa who has already served all or part of the NARWP for these payments in respect of their temporary partner visa does not have to re-start or re-serve the NARWP if they are granted a permanent visa. It reflects that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are granted to allow the holder to stay in Australia while their application for a permanent partner visa is being processed.

The determination under paragraph 739A(4)(b) of the Act is a beneficial arrangement. This arrangement clarifies that temporary partner visa holders will not have their NARWP re-set once they transition to the permanent partner visa and will not delay their access to support through special benefit, family tax benefit Part A, parental leave pay and dad and partner pay, where otherwise eligible.

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This Amendment Determination supports the rights to social security, right to an adequate standard of living, right to maternity leave, right to respect for the family and rights of parents and children by providing that holders and former holders of Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas do not have to wait longer than the intended NARWP before having access to certain welfare payments, including special benefit, family tax benefit Part A and paid parental leave payments.

Right to equality and non-discrimination

Under existing provisions in the Act, the FA Act and the PPL Act, Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are among a limited number of temporary visas that have access to certain welfare payments, subject to serving any applicable waiting period. Most other temporary visas do not have access to welfare payments, which reflects the residency-based nature of Australia's welfare payments system.

Unlike most other temporary visa types, a person must apply for a temporary partner or partner provisional visa at the same time as a permanent partner visa. While other temporary visa holders may choose to subsequently apply for a permanent visa, the temporary visa is not part of the application process for the permanent visa.

Temporary partner and partner provisional visa holders are treated differently to other temporary visa holders under existing legislation to recognise that these visa holders have entered Australia with the intention of settling permanently. The provisional or temporary partner visa is granted so the visa holder can stay in Australia while their application for a permanent partner visa is processed.

This Amendment Determination specifies that Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are classes of visas for the purposes of special benefit under paragraph 739A(4)(b) of the Act. This has a flow on effect to the equivalent waiting periods for family payments, including family tax benefit, parental leave pay and dad and partner pay.

As outlined above, the impact of this specification is to provide that holders of one of these visa subclasses who have already served all or part of the NARWP for these payments in respect of their temporary partner visa will not have to re-start or re-serve the NARWP if they are granted a permanent visa.

Differential treatment for this cohort reflects the nature and purpose of these temporary visas which are granted to allow the holder to stay in Australia while their application for a permanent partner visa is being processed. To the extent that this limits the right to equality and non-discrimination, this is considered reasonable and proportionate to achieving the legitimate objective of ensuring that these visa holders meet their own living costs for a reasonable period before receiving Government assistance, without having to serve multiple waiting periods once they are granted a permanent visa.

Conclusion

This Amendment Determination is compatible with human rights by specifying that holders of the determined visas who have partially or fully served the NARWP do not have to serve another NARWP for special benefit, family tax benefit, parental leave pay or dad and partner pay when they are granted a permanent visa.

This supports the rights to social security, an adequate standard of living, maternity leave, respect for the family and the rights of parents and children by clarifying that these visa holders do not have to serve consecutive waiting periods before having access to certain welfare payments. To the extent that this differential treatment may limit other rights, that limitation is legitimate, reasonable, necessary and proportionate.

The Hon Paul Fletcher MP, Minister for Families and Social Services