

## **EXPLANATORY STATEMENT**

Issued by the Minister for Population, Cities and Urban Infrastructure  
for the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

### *Migration Act 1958*

#### *Migration Amendment (Prospective Marriage Visas) Regulations 2020*

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 (Prospective Marriage Visas) Regulations 2020* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations).

The Regulations address the impact of COVID-19 travel restrictions by extending the duration of Subclass 300 (Prospective Marriage) visas, to 31 March 2022, if the visa holder or former holder was outside Australia on 10 December 2020, and the visa was in effect at any time during the period from 6 October 2020 to 10 December 2020. This is a significant extension of visas that otherwise expire nine months after the date of grant.

The Regulations implement decisions made as part of the Federal Budget for 2020-21, which included providing refunds of visa application charges (which will be implemented under existing regulations) or extensions of visa validity periods for Subclass 300 visas. All Subclass 300 visas that were in effect on the date of the Budget have been extended, as have visas granted after that date up until 10 December 2020.

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 visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at Attachment A. These include, for example, subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

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 respond quickly to emerging situations such as the COVID-19 pandemic.

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 B.

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 42822.

No formal consultation has been undertaken on these measures. However, the measures have been informed by feedback received from a number of stakeholders, including affected visa holders, who have raised concerns about the adverse effects of travel restrictions on this cohort. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Regulations commence retrospectively on 6 October 2020, the date the 2020-21 Budget was released. As the changes are beneficial to all affected persons, it is appropriate to provide for retrospective commencement.

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

Further details of the Regulations are set out in Attachment C.

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

The 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 may also be relevant:

- subsection 29(1), which provides that, subject to the Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to Australia; (b) remain in Australia;
- subsection 30(2), which provides that a visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain: (a) during a specified period; or (b) until a specified event happens; or (c) while the holder has a specified status;
- subsection 31(1), which provides that the regulations may prescribe 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 the regulations may specify that a visa is a visa of a particular class; and
- 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.

## **Statement of Compatibility with Human Rights**

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

### ***Migration Amendment (Prospective Marriage Visas) Regulations 2020***

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 Subclass 300 (Prospective Marriage) visa provides a pathway for prospective spouses of Australian citizens, permanent residents or eligible New Zealand citizens to enter and stay in Australia for a period of nine months and marry their partner, prior to lodgement of a permanent Partner visa application.

COVID-19 related travel restrictions and practical limitations have meant that many Prospective Marriage visa holders have been unable to travel to Australia within their visa validity period to marry their partner and apply for a permanent Partner visa.

The *Migration Amendment (Prospective Marriage Visas) Regulations 2020* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations).

The Regulations address the negative impact of COVID-19 travel restrictions by extending the duration of Subclass 300 (Prospective Marriage) visas to 31 March 2022, for those outside Australia who held that type of visa at any time between 6 October 2020 and 10 December 2020. This is a significant extension of visas that otherwise expire nine months after the date of grant.

The Regulations implement decisions made as part of the Federal Budget for 2020-21, which included providing refunds of visa application charges (which will be implemented under existing regulations) or extensions of visa validity periods for Subclass 300 visas. All Subclass 300 visas that were in effect on the date of the Budget (6 October 2020) have been extended, as have visas granted after that date up until 10 December 2020.

#### **Human rights implications**

This Disallowable Legislative Instrument may positively engage the following right:

- Right to respect for the family
  - Article 23 of the International Covenant on Civil and Political Rights provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that the right of men and women of marriageable age to marry and to found a family shall be recognised.
  - Extending the visa validity period for Prospective Marriage visa holders and former holders provides prospective spouses of Australian citizens, permanent residents or eligible New Zealand citizens with additional time (until 31 March 2022) to enter Australia and marry their partner.

- These changes assist in mitigating the negative impact of travel restrictions on Prospective Marriage visa holders and former holders who have been unable to utilise their visa to travel to Australia due to circumstances outside of their control. They provide a positive benefit to both the visa holders/former visa holders who are outside Australia and their Australian partners in Australia, further supporting the reunification of prospective spouses with their Australian partners, and further supporting the right to respect for the family of those Australian partners.

## **Conclusion**

The Disallowable Legislative Instrument is compatible with human rights.

**The Hon Alan Tudge MP**

**Minister for Population, Cities and Urban Infrastructure for the Minister for  
Immigration, Citizenship, Migrant Services and Multicultural Affairs**

**Details of the Migration Amendment (Prospective Marriage Visas) Regulations 2020**

**Section 1 - Name**

This section provides that the name of the instrument is the *Migration Amendment (Prospective Marriage Visas) Regulations 2020*.

**Section 2 - Commencement**

This section provides for the commencement of the *Migration Amendment (Prospective Marriage Visas) Regulations 2020* (the Regulations).

The Regulations commence retrospectively, on 6 October 2020, which was the date of the Budget announcements. Retrospective commencement is necessary because an amendment with prospective operation could only apply to visas in effect when the amendment commences, and would not apply to the visas that ceased on or after 6 October 2020. A small number of visas ceased to be in effect on or after 6 October 2020.

A small number of Subclass 300 (Prospective Marriage) visas have also been granted since 6 October 2020. Visas granted between 6 October 2020 and 10 December 2020 have also been extended to ensure fair and consistent treatment, given the uncertainty about when the COVID-19 travel restrictions will end.

Retrospective regulations are permissible in accordance with section 12 of the *Legislation Act 2003*. Subsections 12(1A) and 12(2) provide:

*Retrospective commencement*

*(1A) Despite any principle or rule of common law, a legislative instrument or notifiable instrument may provide that the instrument, or a provision of the instrument, commences before the instrument is registered.*

*Retrospective application*

*(2) However, if a legislative instrument or notifiable instrument, or a provision of such an instrument, commences before the instrument is registered, the instrument or provision does not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) to the extent that as a result of that commencement:*

- (a) the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person; or*
- (b) liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.*

The amendments to extend the duration of visas, including the small number of visas that have ceased since 6 October 2020, are beneficial to visa holders. There is no disadvantageous impact on any person's rights and no liabilities are imposed on any person in respect of anything done or omitted to be done before the instrument is registered.

### 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 to the Regulations, the specified instrument is the *Migration Regulations 1994* (the Migration Regulations).

### Schedule 1 – Amendments

#### ***Migration Regulations 1994***

#### **Item [1] – After clause 300.511 of Schedule 2**

This item inserts new clause 300.512 in Schedule 2 to the Migration Regulations, to extend certain Subclass 300 (Prospective Marriage) visas so that, instead of ceasing 9 months after the visa is granted (the effect of existing clause 300.511), the visas cease on 31 March 2022.

The visa extension applies if:

- the visa was in effect at any time during the period beginning on 6 October 2020 and ending on 10 December 2020; and
- the holder was outside Australia on 10 December 2020.

As a consequence of the COVID-19 travel restrictions implemented by Australia from February 2020, it has not been possible for most Subclass 300 (Prospective Marriage) visa holders to travel to Australia. Subclass 300 visa holders are subject to the travel restrictions and, unless an exemption is granted by the Commissioner of the Australian Border Force, travel to Australia is not permitted.

This has resulted in the progressive expiry of Subclass 300 visas during 2020 in situations where the holder has not been able to travel to Australia to marry the Australian partner as planned. To address this situation it was decided as part of the 2020-21 Federal Budget that refunds of visa application charges would be provided if the visa ceased before 6 October 2020, and the option of visa extension or refund would be offered to visas holders whose visas remained in effect on Budget day.

Visas granted between 6 October 2020 and 10 December 2020 have also been extended to ensure fair and consistent treatment, given the uncertainty about when the COVID-19 travel restrictions will end.