

## **EXPLANATORY STATEMENT**

### **Issued by the authority of the Minister for Education and Youth**

#### ***Higher Education Support Act 2003***

#### ***Higher Education Support (Visa Specification for Eligible Former Permanent Humanitarian Visa Holders) Determination 2021***

#### **Authority**

The *Higher Education Support (Visa Specification for Eligible Former Permanent Humanitarian Visa Holders) Determination 2021* (the Determination) is made under subclause 1(1A) of Schedule 1 to the *Higher Education Support Act 2003* (the Act). Subclause 1(1A) of Schedule 1 to the Act provides that the Minister may, for the purposes of paragraph (c) of the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act, make a determination in writing specifying a class or subclass of visas provided for by the *Migration Act 1958* (Migration Act) or regulations made under that Act.

The definition of “eligible former permanent humanitarian visa holder” and the Minister’s power to make the determination in subclause 1(1A) of Schedule 1A to the Act take effect from 1 January 2022 (Part 1 of Schedule 1 to the *Education Legislation Amendment (2021 Measures No. 2) Act 2021*) (the Amendment Act).

The Minister may, in accordance with subsection 4(2) of the *Acts Interpretation Act 1901* (AIA), exercise the power to make the determination in the period after the Amendment Act is enacted but before the enabling provisions commence. If the Determination is registered before 1 January 2022, the Minister relies on this power to ensure the Determination will become effective from 1 January 2022, to determine who falls within the scope of the definition of “eligible former permanent humanitarian visa holder” and, therefore, is eligible for Commonwealth assistance under the Act. If the Determination is registered after 1 January 2022, it will commence prospectively and, therefore, have effect from the day after it is registered.

#### **Background, Purpose and Operation**

Under Part 3-2 of the Act, one of the factors in determining whether students are entitled to Higher Education Loan Program (HELP) assistance is that they must satisfy the citizenship or residency requirements under the relevant provisions in the Act. As a result of amendments to the Act contained in Part 1 of Schedule 1 to the Amendment Act, eligible former permanent humanitarian visa holders can meet the citizenship or residency requirements for HELP assistance under the Act where they hold certain specified visa classes or subclasses (see specifically the amendments to paragraphs 90-5(1)(b), 104-5(1)(b), 118-5(1)(b) and 126-5(1)(b) of the Act in Part 1 of Schedule 1 to the Amendment Act).

The purpose of the *Higher Education Support (Visa Specification for Eligible Former Permanent Humanitarian Visa Holders) Determination 2021* (the Determination) is to specify the classes or subclasses of visas provided for by the Migration Act or regulations made under that Act for the purposes of paragraph (c) of the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act.

The effect of the Determination is that holders of the specified classes or subclasses of visas will meet the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act where they also satisfy paragraphs (a) and (b) in that definition (which they will satisfy where they were previously, but not currently, permanent humanitarian visa holders). In turn, eligible former permanent humanitarian visa holders will be able to meet the citizenship or residency requirements for HELP assistance eligibility.

### **Regulatory Impact**

The Office of Best Practice Regulation (OBPR) has advised that a regulatory impact statement is not required for this Determination (OBPR reference 44341).

### **Commencement**

The Determination takes effect from the later of: (a) the start of the day after the Determination is registered (in case it is registered after 1 January 2022); and (b) on 1 January 2022, immediately after the commencement of Part 1 of Schedule 1 to the Amendment Act.

### **Consultation**

The Department of Education, Skills and Employment consulted with the Department of Home Affairs for the specification of the classes or subclasses of visas in the Determination in July and August 2021. The Department of Home Affairs is broadly supportive of the Determination and its operation, and gave advice on the specification of resident return visa subclasses under the *Migration Regulations 1994*. The Department of Home Affairs’ advice informed the development of the Determination.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### Higher Education Support (Visa Specification for Eligible Former Permanent Humanitarian Visa Holders) Determination 2021

The *Higher Education Support (Visa Specification for Eligible Former Permanent Humanitarian Visa Holders) Determination 2021* (the Determination) 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**

Under Part 3-2 of the *Higher Education Support Act 2003* (the Act), one of the factors in determining whether students are entitled to Higher Education Loan Program (HELP) assistance is that they must satisfy the citizenship or residency requirements under the relevant provisions in the Act. As a result of amendments to the Act contained in Part 1 of Schedule 1 to the *Education Legislation Amendment (2021 Measures No. 2) Act 2021* (the Amendment Act), eligible former permanent humanitarian visa holders can meet the citizenship or residency requirements for HELP assistance under the Act where they hold certain specified visa classes or subclasses (see specifically the amendments to paragraphs 90-5(1)(b), 104-5(1)(b), 118-5(1)(b) and 126-5(1)(b) of the Act in Part 1 of Schedule 1 to the Amendment Act).

The purpose of the Determination is to specify the classes or subclasses of visas provided for by the *Migration Act 1958* or regulations made under that Act for the purposes of paragraph (c) in the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act.

The effect of the Determination is that holders of the specified classes or subclasses of visas will meet the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act where they also satisfy paragraphs (a) and (b) of that definition (which they will satisfy where they were previously, but not currently, permanent humanitarian visa holders). In turn, eligible former permanent humanitarian visa holders will be able to meet the citizenship or residency requirements for HELP assistance eligibility.

#### **Human rights implications**

##### Right to education

The Determination supports the right to education, under Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Paragraph 13(2)(c) of the ICESCR provides that higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

The Determination enables holders of the specified classes or subclasses of visas to meet the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act (as long as they also satisfy paragraphs (a) and (b) in that definition), which is relevant for determining eligibility for HELP assistance under the Act. This will allow a greater

number of students to be eligible for HELP assistance, which will reduce barriers for those students in pursuing higher education.

### Freedom of movement

The Determination engages the right to free movement set out in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), which provides that a person lawfully within the territory of a State (i.e. country) shall be free to move around that State and shall not be prevented from leaving that State.

Prior to the amendments in the Amendment Act, the effect of the citizenship and residency requirements in the Act was that individuals on permanent humanitarian visas who lawfully exited and returned to Australia outside of the five-year travel facility on their visas would lose access to HELP assistance. This consequence had the potential to limit these individuals' freedom of movement, as they may have avoided travelling in order to retain their access to HELP assistance. Including resident return visa holders in the definition of "eligible former permanent humanitarian visa holders" preserves and promotes the right to free movement by ensuring that permanent humanitarian visa holders are not penalised when they lawfully travel outside Australia.

### Right to equality and non-discrimination

The Determination engages Article 26 of the ICCPR, which states that "the law shall prohibit any discrimination and guarantee to all persons equal 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".

The Determination promotes this right by aligning the right to access HELP assistance for permanent humanitarian visa holders with those of Australian citizens and New Zealand citizens on Special Category Visas. Prior to the amendments in the Amendment Act, Australian citizens and New Zealand citizens on a Special Category Visa could exit and return to Australia whilst maintaining their access to HELP assistance, but this was not the case for permanent humanitarian visa holders. Permanent humanitarian visa holders now enjoy this same right.

### **Conclusion**

This Determination is compatible with human rights because it promotes the right to education, the freedom of movement and the right to equality and non-discrimination.

**Hon Alan Tudge MP, Minister for Education and Youth**

# HIGHER EDUCATION SUPPORT (VISA SPECIFICATION FOR ELIGIBLE FORMER PERMANENT HUMANITARIAN VISA HOLDERS) DETERMINATION 2021

## EXPLANATION OF PROVISIONS

### Section 1 – Name

This section provides that the title of the instrument is the *Higher Education Support (Visa Specification for Eligible Former Permanent Humanitarian Visa Holders) Determination 2021* (the Determination).

### Section 2 – Commencement

This section provides that the Determination will commence the later of: (a) the start of the day after the Determination is registered; and (b) immediately after the commencement of Part 1 of Schedule 1 to the *Education Legislation Amendment (2021 Measures No. 2) Act 2021* (the Amendment Act), which contains the enabling provisions for the Determination and will commence on 1 January 2022.

If the Minister makes and registers the Determination after the Amendment Act is enacted but before the enabling provisions commence (on 1 January 2022), the power to make the Determination in that “pre-commencement” period will derive from subsection 4(2) of the *Acts Interpretation Act 1901* (AIA) (noting this provision will not be applicable if the Determination is made and registered after 1 January 2022). This commencement provision ensures the Determination will commence and become effective on either: (a) the day after it is registered, if it is registered after 1 January 2022; or (b) on 1 January 2022, if it is registered before that day. In both cases, the Determination will be purely prospective in its effect (and cannot be effective before 1 January 2022).

### Section 3 – Authority

This section provides that the Determination is made under subclause 1(1A) of Schedule 1 to the Act. As noted above, if the Determination is made and registered before 1 January 2022, it will also be authorised by subsection 4(2) of the AIA.

### Section 4 – Definition

This section defines a term used in the Determination, which is the name of the enabling Act.

### Section 5 – Specification of visas

This section specifies the classes or subclasses of visas provided for by the *Migration Act 1958* the purposes of paragraph (c) in the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act.

This enables holders of the specified classes or subclasses of visas to meet the definition of “eligible former permanent humanitarian visa holder” in subclause 1(1) of Schedule 1 to the Act (as long as they also satisfy paragraphs (a) and (b) in that definition). In turn, the holders of the specified classes or subclasses of visas will be able to meet the citizenship or residency requirements for eligibility to HELP assistance in the Act (as contained in sections 90-5, 104-5, 118-5 and 126-5 of the Act).

The following visa classes and subclasses are specified:

- (a) subclass 155—Five Year Resident Return, of Return (Residence) (Class BB), as referred to in item 1128 of Schedule 1 and clauses 155.1 to 155.6 of Schedule 2 to the *Migration Regulations 1994*; and
- (b) subclass 157—Three Month Resident Return, of Return (Residence) (Class BB), as referred to in item 1128 of Schedule 1 and clauses 157.1 to 157.6 of Schedule 2 to the *Migration Regulations 1994*.