

## EXPLANATORY STATEMENT

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

*Social Security Act 1991*

### ***Social Security (Class of Visas – Qualifying Residence Exemption – Refugee) Declaration 2018***

#### **Purpose**

The *Social Security (Class of Visas – Qualifying Residence Exemption – Refugee) Declaration 2018* (the Declaration) is made under section 25 of the *Social Security Act 1991* (the Act) for the purposes of subparagraph 7(6B)(c)(iii) of the Act.

The purpose of the Declaration is to provide for holders of certain classes of visas to be regarded as a refugee for the purposes of section 7 of the Act. This would enable holders of these visas to have immediate access to social security payments without having to meet prior residence requirements.

In addition to the power to make this instrument under section 25 of the Act, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), 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. Accordingly, the *Social Security (Declaration of Subclass 851 of Resolution of Status (Class CD) Visa Holders as Refugees) Determination 2008* (the 851 Determination) that currently ensures that holders of Subclass 851 visas are to be regarded as refugees for the purposes of subparagraph 7(6B)(c)(iii) of the Act, will be repealed by this Declaration.

#### **Background**

Under the social security law, long term social security payments such as Age Pension and Disability Support Pension have a qualifying residence requirement of ten years. Some income support payments such as Carer Payment and Special Benefit have a “newly arrived resident’s waiting period” of two years.

However, a person has a qualifying residence exemption from all waiting periods for specified pensions and benefit payments if the person is considered a refugee under subsection 7(6) of the Act.

Subparagraph 7(6B)(c)(iii) of the Act provides that a person is a refugee for the purposes of this section if the person is a holder of a permanent visa of a class referred to in a declaration of the Minister under section 25 of the Act.

Section 25 of the Act provides that if the Minister is of the view that a person holding a class of visa should be regarded as refugee for the purposes of section 7, the Minister may, by legislative instrument, declare that class of visas to be a class of visas for the purposes of subparagraph 7(6B)(c)(iii).

The Declaration ensures that holders of Refugee and Humanitarian (Class XB), Subclasses 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue), 204 (Woman at Risk) and Resolution of Status (Class CD) Subclass 851 (Resolution of Status) visas, within the meaning of Schedule 2 to the *Migration Regulations 1994*, will be treated as refugees for the purposes of subparagraph 7(6B)(c)(iii) and thereby have a qualifying residence exemption under subsection 7(6) of the Act.

The 851 Determination declares that Subclass 851 (Resolution of Status) visa is a class of visa for the purposes of subparagraph 7(6B)(c)(iii) of the Act. The 851 Determination is due to be repealed on 1 October 2018 as a result of the sunset provisions in the *Legislation Act 2003*. This Declaration repeals the 851 Determination, and ensures that holders of Subclass 851 visas will continue to be regarded as refugees for the purposes of section 7 of the Act.

In relation to Subclasses 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue), and 204 (Woman at Risk) visas, the Declaration is being made to ensure that longstanding administrative arrangements have a sound legislative basis. This Declaration is beneficial in nature and will not adversely impact any individual.

### **Consultation**

The Department of Home Affairs was consulted to ensure that the visa classes declared by this Declaration are correct and current. Public consultation was considered unnecessary as the Declaration gives effect to administrative arrangements that are already in place.

### **Regulation Impact Statement (RIS)**

The Office of Best Practice Regulation (the OBPR) considers that this Declaration will have no more than a minor regulatory impact, and therefore no Regulation Impact Statement will be required.

### **Explanation of the provisions**

**Section 1** provides that the name of this instrument is the *Social Security (Class of Visas – Qualifying Residence Exemption – Refugee) Declaration 2018*.

**Section 2** provides that the Declaration commences on the day after it is registered on the Federal Register of Legislation.

**Section 3** provides that the authority for making the Declaration is section 25 of the *Social Security Act 1991*.

**Section 4** defines Act as the *Social Security Act 1991*.

**Section 5** provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Section 6** declares classes of visas, within the meaning of Schedule 2 to the *Migration Regulations 1994*, for the purposes of subparagraph 7(6B)(c)(iii) of the Act. The classes of visas are:

Refugee and Humanitarian (Class XB)

- (a) Subclass 200 (Refugee);
- (b) Subclass 201 (In-country Special Humanitarian);
- (c) Subclass 202 (Global Special Humanitarian);
- (d) Subclass 203 (Emergency Rescue); and
- (e) Subclass 204 (Woman at Risk);

Resolution of Status (Class CD)

- (f) Subclass 851 (Resolution of Status).

### **Schedule 1 – Repeals**

**Item 1** repeals the *Social Security (Declaration of Subclass 851 of Resolution of Status (Class CD) Visa Holders as Refugees) Determination 2008*.

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

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

### *Social Security (Class of Visas – Qualifying Residence Exemption – Refugee) Declaration 2018*

The Declaration 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**

The purpose of the *Social Security (Class of Visas – Qualifying Residence Exemption – Refugee) Declaration 2018* (the Declaration) is to provide for holders of Subclasses 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue), 204 (Woman at Risk) and 851 (Resolution of Status) visas, within the meaning of Schedule 2 to the *Migration Regulations 1994*, to continue to be regarded as a refugee for the purposes of section 7 of the *Social Security Act 1991*.

This would enable holders of these visas to have immediate access to social security payments without having to meet prior residence requirements.

#### **Human rights implications**

The Declaration engages or gives effect to the following human rights:

- the right to social security contained in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to an adequate standard of living contained in Article 11(1) of the ICESCR, and Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

The Declaration will provide financial assistance, in the form of more immediate access to social security payments, to those who are granted a Refugee and Humanitarian (Class XB) visa, Subclass 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue), 204 (Woman at Risk) or Resolution of Status (Class CD), Subclass 851 (Resolution of Status). This supports the long-standing policy to exempt refugees from all waiting periods for social security payments, recognising that most refugees arrive with limited money, assets and social networks to assist them to meet basic living expenses. This also demonstrates Australia's commitment to complying with the provisions of the 1951 United Nations (UN) Refugee Convention and the 1967 UN Protocol, to which Australia is a signatory. As such, the Declaration is consistent with Australia's international obligations under the ICESCR and the CRPD.

#### **Conclusion**

The Declaration is compatible with human rights as it promotes the right to social security and an adequate standard of living for certain visa holders.

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