

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Act 1958

Migration Amendment (Prospective Marriage Visas) Regulations 2021

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 2021* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to address the ongoing impact of COVID-19 by providing for the extension of Subclass 300 (Prospective Marriage) visas to 31 December 2022 if the visa holder was outside Australia on 15 September 2021 and the visa was in effect on 15 September 2021.

The Regulations build on previous amendments to implement flexibility for Subclass 300 (Prospective Marriage) visa holders impacted by travel restrictions arising from COVID-19. *Migration Amendment (Prospective Marriage Visas) Regulations 2020* extended the duration of Subclass 300 (Prospective Marriage) visas to 31 March 2022 for certain visa holders outside Australia. These Regulations extend visas to 31 December 2022 for visa holders outside Australia on 15 September 2021.

The Regulations commence retrospectively on 15 September 2021, a day before the first Subclass 300 visa held by a person outside Australia ceased. As the changes are beneficial to all affected persons, it is appropriate to provide for retrospective commencement. Retrospective commencement of the amendments is therefore consistent with section 12 of the *Legislation Act 2003* (the Legislation Act).

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 provision listed at Attachment A.

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 Regulations 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. The amendments are beneficial to affected applicants, are consistent with similar COVID-19 concessions and do not substantially alter existing arrangements. This accords with subsection 17(1) of the Legislation Act.

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

Further details of the Regulations are set out in [Attachment C](#)

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(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; and
- subsection 31(5), which provides that the regulations may specify that a visa is a visa of a particular class.

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 2021

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 Prospective Marriage (Subclass 300) 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 between nine to fifteen 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.

On 10 December 2020, the *Migration Amendment (Prospective Marriage Visas) Regulations 2020* extended the visa validity period to 31 March 2022, for Prospective Marriage visa holders or former visa holders who were outside Australia on 10 December 2020, and who held a Prospective Marriage visa at any time between 6 October 2020 and 10 December 2020.

On 18 August 2021, the Government announced a change to travel exemption settings for travel to Australia, to allow Prospective Marriage (Subclass 300) visa holders to obtain a travel exemption when at least 12 months has passed since the visa holder first lodged their Prospective Marriage visa application.

While this change to the travel exemptions settings will assist some Prospective Marriage visa holders, as the COVID-19 pandemic continues into 2021-22, many visa holders remain outside Australia and continue to face difficulties in arriving in Australia within their visa validity period. This may be for example, due to limited quarantine places, flight availability and other practical limitations.

The *Migration Amendment (Prospective Marriage Visas) Regulations 2021* amend the *Migration Regulations 1994* to address the impact of COVID-19 related travel difficulties by extending the duration of Subclass 300 (Prospective Marriage) visas to 31 December 2022, for those outside Australia who held that type of visa on 15 September 2021. An extension until 31 December 2022 will provide Prospective Marriage visa holders who are outside Australia, including those eligible for a discretionary travel exemption and those whose visas were extended to 31 March 2022, with additional time to secure a flight to Australia and marry their partner within their visa validity period.

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 provides prospective spouses of Australian citizens, permanent residents or eligible New Zealand citizens with additional time (until 31 December 2022) to enter Australia and marry their partner.

These changes assist in mitigating the negative impact of COVID-19 related travel difficulties on Prospective Marriage visa holders who continue to face difficulties in travelling to Australia due to circumstances outside of their control. They provide a positive benefit to both the 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 Alex Hawke MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Details of the Migration Amendment (Prospective Marriage Visas) Regulations 2021

Section 1 – Name

This section provides that the name of the instrument is the Migration Amendment (Prospective Marriage Visas) Regulations 2021 (the Regulations).

Section 2 – Commencement

This section provides for the commencement of the instrument.

Subsection 2(1) provides that each provision of the Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The effect of the table is that the Regulations commence on 15 September 2021.

Subsection 2(2) provides that any information in column 3 of the table is not part of the regulations. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958*.

Section 4 – Schedules

This section provides for how the amendments in the regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Division 300.5 of Schedule 2

This item amends Division 300.5 of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations) to insert a new clause 300.513 to provide for the extension of Subclass 300 (Prospective Marriage) visas to 31 December 2022 if the visa holder was outside Australia on 15 September 2021 and the visa was in effect on 15 September 2021. The amendments build on previous amendments to implement flexibility for Subclass 300 (Prospective Marriage) visa holders impacted by travel restrictions arising from COVID-19. The *Migration Amendment (Prospective Marriage Visas) Regulations 2020* extended the duration of Subclass 300 (Prospective Marriage) visas to 31 March 2022 for certain visa holders outside Australia. These amendments extend visas to 31 December 2022 for visa holders outside Australia on 15 September 2021.

This amendment commences retrospectively on 15 September 2021, a day before the first Subclass 300 visa held by a person outside Australia ceased.

This retrospective commencement is consistent 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.

As the amendments to extend certain Subclass 300 (Prospective Marriage) visas to 31 December 2022 are beneficial to all affected persons, it is appropriate to provide for retrospective commencement. 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. Retrospective commencement of the amendments is therefore consistent with section 12 of the *Legislation Act 2003*.