

EXPLANATORY STATEMENT

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

Migration Act 1958

Migration Amendment (Clarifying International Obligations for Removal) 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.

Subsection 419(1) of the Migration Act provides that if an application for review of a decision under subsection 197D(2) of the Migration Act is made to the Administrative Appeals Tribunal (the Tribunal), the Tribunal must make its decision on review, and notify the applicant of the decision, within a prescribed period.

Subsection 197D(2) of the Migration Act, inserted by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, sets out the Minister's decision-making power in relation to certain individuals who were previously determined to have engaged protection obligations but are subsequently found by the Minister to no longer engage those obligations. Paragraph 411(1)(e) of the Migration Act provides that decisions under subsection 197D(2) are *Part 7-reviewable decisions* (as defined in section 411 of the Migration Act), reviewable by the Tribunal.

The *Migration Amendment (Clarifying International Obligation for Removal) Regulations 2021* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations). The amendments are consequential to the commencement of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*.

The Regulations amend the Migration Regulations to prescribe a period of 120 days, for the purposes of subsection 419(1), for the Tribunal to make its decision in relation to review of a decision under subsection 197D(2) of the Migration Act – and to notify the applicant of that decision. This period would start when the application for review is received by the Tribunal, and would end at the end of 120 days starting on the first working day after the day on which the Tribunal received the application.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by parliamentary enactment. It is appropriate for matters of detail to be set out in delegated legislation. The Migration Act expressly provides for these matters to be prescribed in regulations.

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 A.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the proposed amendments. The OBPR has advised that a Regulation Impact Statement is not required. The OBPR consultation reference number is 44080.

In addition, the Department has consulted the Tribunal and the Attorney-General's Department in relation to the Regulations, and their feedback has been considered.

The Regulations commenced on the day after registration on the Federal Register of Legislation.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

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

Statement of Compatibility with Human Rights

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

Migration Amendment (Clarifying International Obligations for Removal) 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 Disallowable Legislative Instrument prescribes the period for the Administrative Appeals Tribunal (the Tribunal) to decide certain applications for merits review, consequential to the commencement of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*.

Relevantly, the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 amended section 197C of the Migration Act 1958 (the Migration Act) to ensure that section 198 of the Migration Act does not require or authorise the removal of an unlawful non-citizen to a country in relation to which that unlawful non-citizen has been found to engage *non-refoulement* obligations through the protection visa process, by way of a ‘protection finding’. However, the amended section 197C of the Migration Act does permit the removal powers to operate where:

- the decision in which the protection finding was made has been quashed or set aside;
- the Minister makes a decision under new subsection 197D(2) that the unlawful non-citizen is no longer a person in respect of whom a protection finding would be made and merits review of that decision is complete; or
- the non-citizen requests, in writing, to be removed to that country.

The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* also amended the Migration Act to provide for merits review of the decision under new subsection 197D(2). Paragraph 411(1)(e) of the Migration Act provides that decisions under subsection 197D(2) are ‘Part 7-reviewable decisions’ (as defined in the Migration Act), reviewable by the Tribunal. Subsection 419(1) of the Migration Act provides that if an application for review of a decision under subsection 197D(2) of the Migration Act is made to the Tribunal, the Tribunal must make its decision on review, and notify the applicant of the decision, within a prescribed period.

The purpose of this Disallowable Legislative Instrument is to amend the *Migration Regulations 1994* (the Migration Regulations) to provide that the prescribed period for the Tribunal to make its decision in relation to review of a decision under subsection 197D(2) of the Migration Act – and notify the applicant of that decision – is 120 days. This period will start when the application for review is received by the Tribunal, and will end at the end of 120 days starting on the first working day after the day on which the Tribunal received the application. Should this time period prove insufficient, subparagraph 419(2) of the Migration

Act enables the Tribunal, with the applicant's consent, to extend this period to allow flexibility if the decision on review is particularly complex or other circumstances arise which may result in the Tribunal not meeting this timeframe.

Human rights implications

This Disallowable Legislative Instrument may engage rights relating to *non-refoulement*.

Article 3 of the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (CAT) states:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Non-refoulement obligations also arise, by implication, in relation to Articles 6 and 7 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 6 of the ICCPR states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The primary purpose of the amendments made by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* was to clarify that the duty to remove under section 198 of the Migration Act is not enlivened where to do so would be in breach of *non-refoulement* obligations, as identified in a protection visa assessment process. Those amendments also included a merits review right for unlawful non-citizens who were previously determined to have engaged protection obligations (but who were not granted a visa, or had that visa cancelled, including because of character or security concerns) and are found, under new section 197D, to no longer engage those obligations. Further, the person is not subject to involuntary removal while merits review of that decision is ongoing. The merits review mechanism therefore further strengthens protections from removal where a person may engage *non-refoulement* obligations under the CAT and the ICCPR, as well as under the 1951 *Convention relating to the Status of Refugees* and its 1967 Protocol.

Since this Disallowable Legislative Instrument implements aspects of this merits review process, it may also engage these rights.

Prescribing a period of 120 days in which the Tribunal must make its decision on review, and notify the applicant of that decision, helps ensure the Tribunal deals with such matters expeditiously and helps provide certainty for the review applicant about the period of time that may be taken by the Tribunal to make a decision on review. The proposed amendment does not preclude the Tribunal from making its decision at any stage before the end of the prescribed 120-day period. The prescribed period is intended to strike a balance between providing the Tribunal with an appropriate period to conduct a review of this nature with the need to provide certainty for the review applicant as soon as practicable, noting the review applicant may be in immigration detention while the review applicant is awaiting an outcome.

Importantly, in the event the Tribunal is not able to make a decision, or notify the applicant of that decision, within the prescribed period, subparagraph 419(2) of the Migration Act provides that the Tribunal, with the applicant's consent, may extend this period. This provision provides flexibility if the decision on review is particularly complex or other circumstances arise which may result in the Tribunal not being able to make its decision or notify the applicant of its decision within the prescribed period.

Combined, these provisions ensure that a review of a decision under subsection 197D(2) of the Migration Act will be dealt with expeditiously, and the review applicant will have certainty as to the period that their review application will be finalised within, while ensuring that the Tribunal has sufficient time to consider complex circumstances and extend the time if need be.

While the Disallowable Legislative Instrument prescribes the period for the Tribunal to make its decision (and notify the applicant of that decision) in relation to review of a decision under subsection 197D(2) of the Migration Act, a decision made after the expiry of the period, including where the review applicant has not consented to an extension, will still be a valid decision. Furthermore, involuntary removal will continue to not be authorised under the Migration Act while the Tribunal completes its review.

The amendments made by this Disallowable Legislative Instrument to implement aspects of the merits review process do not limit, and may assist in promoting, protections from *refoulement*.

Conclusion

This 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 (Clarifying International Obligations for Removal) Regulations 2021

Section 1 – Name

This section provides that the title of the Regulations is the *Migration Amendment (Clarifying International Obligations for Removal) Regulations 2021*.

Section 2 – Commencement

This section provides for the commencement of each provision in the Regulations, as set out in the table immediately below subsection 2(1), on the day after the Regulations are registered.

Subsection 2(2) provides that the information in column 3 of the table is not part of the Regulations. It is intended to assist readers of the Regulations.

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 that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule to the Regulations will have effect according to its terms.

Schedule 1 to the Regulations amends the *Migration Regulations 1994* (the Migration Regulations).

Schedule 1 – Amendments

Item [1] – After regulation 4.34

This item inserts new regulation 4.34A, which prescribes, for the purposes of subsection 419(1) of the Migration Act, the period in which the Tribunal must make its decision on review of a decision under subsection 197D(2), and notify the applicant of the decision.

Paragraph 4.34A(a) specifies that for the purposes of subsection 419(1) of the Migration Act, the prescribed period starts when the application for review is received by the Tribunal.

Paragraph 4.34A(b) specifies that for the purposes of subsection 419(1) of the Migration Act, the prescribed period ends at the end of 120 days, starting on the first working day after the day on which the application is received by the Tribunal.

The note immediately below regulation 4.34A makes clear that subsection 419(1) of the Migration Act provides for the Migration Regulations to limit the time in which the Tribunal must review a decision under subsection 197D(2) of the Migration Act that an unlawful non-citizen is no longer a person in respect of whom a protection finding would be made.

Prescribing a period of 120 days in which the Tribunal must make its decision on review, and notify the applicant of that decision, provides certainty for the review applicant about the period of time that may be taken by the Tribunal to make a decision on review. The amendment does not preclude the Tribunal from making its decision at any stage before the end of the prescribed 120-day period. The prescribed period is intended to strike a balance between providing the Tribunal with an appropriate period to conduct a review of this nature, with the need to provide certainty for the review applicant as soon as practicable, noting the review applicant may be in immigration detention while awaiting the Tribunal's decision.

In the event the Tribunal is not able to make a decision, or notify the applicant of that decision, within the prescribed period, subsection 419(2) of the Migration Act provides that the Tribunal may, with the agreement of the applicant, extend the period for the purposes of a particular application. This provision provides flexibility if the decision on review is particularly complex, or other circumstances arise which may result in the Tribunal not being able to notify the applicant of its decision within the prescribed period.

Any extension to such period must be agreed by the affected unlawful non-citizen (the review applicant). Should the situation arise whereby the prescribed period ends before the Tribunal makes its decision, and the review applicant does not agree to extend the period, this does not result in the original decision under subsection 197D(2) being taken to be affirmed.

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