

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Status of Forces Agreement) Regulations 2022

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, paragraph 33(2)(a) of the Migration Act provides that a non-citizen is taken to have been granted a special purpose visa if the non-citizen has a prescribed status or is a member of a class of persons that has a prescribed status.

The *Migration Amendment (Status of Forces Agreement) Regulations 2022* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to prescribe Japanese Self-Defense Force members and civilian component members, coming under the Reciprocal Access Agreement between Australia and Japan, for the purposes of being taken to be granted a special purpose visa.

The Reciprocal Access Agreement relating to defence cooperation between Australia and Japan, also known as a Status of Forces Agreement (SOFA), was signed by the former Prime Minister of Australia and the Prime Minister of Japan on 6 January 2022. Under Article XXIX of the SOFA, the SOFA enters into force on the fifth day after the date on which the Parties exchange diplomatic notes informing each other that their respective internal procedures necessary to give effect to the Agreement have been completed. The SOFA is available on the Department of Defence website at <https://www.defence.gov.au/business-industry/export/international-engagement>.

Article VI of the SOFA relates to facilitating the entry and stay of the visiting force and civilian component to perform official duties under the SOFA, without the requirement to apply for a visa.

Under the Migration Act, a person having a prescribed status is taken to be granted a special purpose visa by operation of law, without the person having to apply for the visa. The Regulations implement Article VI of the SOFA by prescribing members of the Japanese armed forces and the civilian component, who come under the SOFA and who hold the relevant documents, as classes of persons for the purposes of being taken to be granted a special purpose visa. Members of the Japanese armed forces and civilian component would enter Australia to carry out official duties in accordance with the terms of the SOFA.

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 settings 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. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

A Statement of Compatibility with Human Rights 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 amendments. No Regulation Impact Statement is required. The OBPR consultation reference number is 44057.

The Department of Defence led on negotiations with Japan in consultation with the Department of Home Affairs. The Department of Foreign Affairs and Trade facilitated discussions throughout the process of negotiation. The SOFA was subject to public consultation as part of the parliamentary review by the Joint Standing Committee on Treaties (JSCOT). The JSCOT sought submissions from the public after the SOFA was tabled in February 2022 and six submissions were received, which are accessible on the JSCOT website. Public consultation was not considered appropriate on the amendments to facilitate the grant of a special purpose visa to relevant members under the SOFA. The consultations undertaken accord with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on the day the SOFA between Australia and Japan comes into force (on the fifth day after the exchange of diplomatic notes), unless the SOFA comes into force before the Regulations are registered on the Federal Register of Legislation, in which case they commence on the day after registration. However, the amendments do not commence at all if the SOFA between Australia and Japan does not come into force within 18 months of the Regulations being registered.

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

The Regulations amend the Migration Regulations which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

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.

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Migration Amendment (Status of Forces Agreement) Regulations 2022

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 purpose of the *Migration Amendment (Status of Forces Agreement) Regulations 2022* (the Amendment Regulations) is to give effect to aspects of the *Agreement Between Australia and Japan Concerning the Facilitation of Reciprocal Access and Cooperation Between the Australian Defence Force and the Self-Defense Forces of Japan* which was signed in January 2022 and will come into force once final implementation steps are taken by both countries. This type of agreement is commonly known as a Status of Forces Agreement (SOFA). The Amendment Regulations amend the *Migration Regulations 1994* (Migration Regulations) to allow members of the Japanese armed forces and civilian component to be taken to be granted a special purpose visa to travel to, enter and remain in Australia to carry out official duties in accordance with the terms of the SOFA.

The Amendment Regulations achieve this by amending the Migration Regulations to prescribe members of the Japanese armed forces and civilian component, who come under the SOFA and who hold the relevant documents, as classes of persons having a prescribed status for the purposes of being taken to be granted a special purpose visa under section 33 of the *Migration Act 1958*.

While SOFAs with other countries have extended entry to dependants of members of the armed forces and civilian component, the SOFA with Japan does not extend to dependants, reflecting the agreement reached by the parties. Therefore, the Amendment Regulations do not prescribe dependants of members of the Japanese armed forces or the civilian component as a class of persons having a prescribed status for the purposes of being taken to be granted a special purpose visa, as they are not included in the SOFA.

Human rights implications

This Disallowable Legislative Instrument engages the following right:

- the right to work in Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to work

This Disallowable Legislative Instrument engages Article 6(1) of the ICESCR. Article 6(1) states:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

This Disallowable Legislative Instrument may positively engage the right to work of Japanese Armed Forces personnel deployed to Australia under the SOFA by allowing them to work as visa holders in line with their official duties under the SOFA.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights.

The Hon. Andrew Giles MP,

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Details of the Migration Amendment (Status of Forces Agreement) Regulations 2022

Section 1 - Name

This section provides that the name of the Regulations is the *Migration Amendment (Status of Forces Agreement) Regulations 2022*.

Section 2 - Commencement

This section provides that the Regulations commence on the day the SOFA between Australia and Japan comes into force, unless the SOFA comes into force before the Regulations are registered on the Federal Register of Legislation, in which case they commence on the day after registration. However, the Regulations do not commence at all if the SOFA between Australia and Japan does not come into force within 18 months of the Regulations being registered. Article XXIX of the SOFA provides that the Agreement enters into force on the fifth day after the date on which the Parties exchange diplomatic notes informing each other that their respective internal procedures necessary to give effect to the Agreement have been completed.

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 how the amendments made by the Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Regulation 1.03 (subparagraph (a)(iii) of the definition of foreign armed forces dependant)

This item amends subparagraph (a)(iii) of the definition of *foreign armed forces dependant* in regulation 1.03 of the Migration Regulations by inserting the words “other than one who is, for the purposes of a Status of Forces Agreement between Australia and Japan, a member of the armed forces of Japan”, after the word “member”.

This amendment excludes dependants of members of the armed forces of Japan under the Status of Forces Agreement between Australia and Japan from the definition of *foreign armed forces dependant*, with the effect that only members of the armed forces of Japan have a prescribed status as the holder of a special purpose visa with no provision for any accompanying dependants also to hold a special purpose visa. This reflects the fact that the SOFA with Japan specifically does not extend to the entry and stay in Australia of dependants of members of the Japanese Self-Defense Forces.

Item [2] – Regulation 1.03 (subparagraph (a)(iv) of the definition of foreign armed forces dependant)

This item amends subparagraph (a)(iv) of the definition of *foreign armed forces dependant* in regulation 1.03 of the Migration Regulations by inserting the words “other than one who is, for the purposes of a Status of Forces Agreement between Australia and Japan, a member of the civilian component of the armed forces of Japan”, after “member”.

This amendment excludes dependants of members of the civilian component of the armed forces of Japan under the SOFA between Australia and Japan from the definition of *foreign armed forces dependant*, with the effect that only members of the civilian component of the armed forces of Japan have a prescribed status as the holder of a special purpose visa with no provision for any accompanying dependants also to hold a special purpose visa. This reflects the fact that the SOFA with Japan specifically does not extend to the entry and stay in Australia of dependants of members of the civilian component of the Japanese Self-Defense Forces.

Item [3] – Regulation 1.03 (paragraph (a) of the definition of SOFA forces civilian component member)

This item amends paragraph (a) of the definition of *SOFA forces civilian component member* in regulation 1.03 by inserting the words “Japan,” after “France,” to include Japan in the definition of *SOFA forces civilian component member*.

The effect of this amendment is to include a person who is a member of the civilian component of the armed forces of Japan, for the purposes of the SOFA between Australia and Japan, as coming within the definition of *SOFA forces civilian component member* provided the person holds a national passport that is in force and a certificate that he or she is a member of the civilian component of the armed forces of Japan.

A person who comes within the definition of *SOFA forces civilian component members* has a prescribed status under paragraph 2.40(1)(e) of the Migration Regulations and is taken to have been granted special purpose visa to travel to, enter and remain in Australia under subsection 33(2) of the Migration Act.

Prescribing Japanese civilian component members as a class of persons who have a prescribed status for the purposes of holding a special purpose visa gives effect to Article VI of the SOFA with Japan.

Item [4] – Regulation 1.03 (paragraph (a) of the definition of SOFA forces member)

This item amends paragraph (a) of the definition of *SOFA forces member* in regulation 1.03 by inserting the words “Japan,” after “France,” to include Japan in the definition of *SOFA forces member*.

The effect of this amendment is to include a person who is a member of the Japanese Self-Defense Forces, for the purposes of the SOFA between Australia and Japan, as coming within the definition of *SOFA forces member* provided the person holds military identity documents and movement orders issued from an official source of Japan.

A person who comes within the definition of *SOFA forces member* has a prescribed status under paragraph 2.40(1)(d) of the Migration Regulations and is taken to have been granted special purpose visa to travel to, enter and remain in Australia under subsection 33(2) of the Migration Act.

Prescribing Japanese forces members as a class of persons who have a prescribed status for the purposes of holding a special purpose visa gives effect to Article VI of the SOFA with Japan.

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