

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Status of Forces Agreement - Fiji and Timor-Leste) Regulations 2023

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.

Paragraph 33(2)(a) of the Migration Act provides that a non-citizen is taken to have been granted a Special Purpose Visa (SPV) 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 – Fiji and Timor-Leste) Regulations 2023* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to prescribe Fijian and Timor-Leste armed forces, civilian component personnel and their dependants, coming under the Reciprocal Access Agreement between Australia and Fiji and Australia and Timor-Leste respectively, for the purposes of being taken to be granted a SPV.

The Reciprocal Access Agreements relating to the cooperation between Australia and Fiji and Australia and Timor-Leste, also known as a Status of Forces Agreement (SOFA), were signed on 20 October 2022, and 7 September 2022, respectively. Under Article 24 of the Fiji Agreement and Article 5 the Timor-Leste Agreement, the SOFAs enter into force on the date on which the Parties exchange diplomatic notes informing each other that their respective internal procedures necessary to give effect to the Agreements have been completed.

Article 7 of the Fiji SOFA and Article 4 of Annex 1 of the Timor-Leste SOFA require the receiving country to facilitate entry and stay of the visiting force, civilian components, and their dependants, 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 SPV by operation of law, without the person having to apply for the visa. The Regulations implement Article 7 of the Fiji SOFA and Article 4 of the Timor-Leste SOFA by including members of the Fijian and Timor-Leste armed forces, civilian component personnel and their dependants, who hold the relevant documents, as classes of persons for the purposes of being taken to be granted a SPV. Members of the Fijian and Timor-Leste 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 Impact Analysis, formerly 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 OBPR22-03697.

The Department of Defence led on negotiations with Fiji and Timor-Leste in consultation with the Department of Home Affairs. Public consultation was not considered appropriate on the amendments to facilitate the grant of a special purpose visa to relevant members under the Fiji SOFA and Timor-Leste SOFA. The consultation undertaken accord with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

Schedule 1 of the Regulations implements the Fiji Agreement and commences on the day that the SOFA with Fiji comes into force. Schedule 2 of the Regulations implements the Timor-Leste Agreement and commence on the day that the SOFA with Timor-Leste comes into force. If either SOFA comes into force before the Regulations are registered on the Federal Register of Legislation, the Regulations commence on the day after registration. If a SOFA does not come into force within 18 months of the Regulations being registered, the relevant Schedule will not commence at all.

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.

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—Fiji and Timor-Leste) Regulations 2023

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 – Fiji and Timor-Leste) Regulations 2023* (the Amendment Regulations) is to give effect to the *Agreement Between Australia and Fiji Concerning the Facilitation of Reciprocal Access and Cooperation Between the Australian Defence Force and the Fijian Armed Forces* which was signed on 20 October 2022 and the *Agreement Between Australia and Timor-Leste Concerning the Facilitation of Reciprocal Access and Cooperation Between the Australian Defence Force and the Timor-Leste Armed Forces* which was signed on 7 September 2022. These Agreements will come into force once final implementation steps are taken by the relevant countries. This type of agreements 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 Fijian as well as the Timor-Leste armed forces and civilian component, and their dependants, to be taken to have been granted a Special Purpose visa (SPV) to travel to, enter and remain in Australia to carry out official duties in accordance with the terms of the relevant SOFA.

The Amendment Regulations achieve this by amending the Migration Regulations to prescribe members of the Fijian and Timor-Leste armed forces, civilian component and dependants, 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 an SPV under section 33 of the *Migration Act 1958*.

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 Fijian and Timor-Leste 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 – Fiji and Timor-Leste) Regulations 2023

Section 1 – Name

This section provides that the name of the Regulations is the *Migration Amendment (Status of Forces Agreement – Fiji and Timor-Leste) Regulations 2023*.

Section 2 – Commencement

This section provides for the commencement of the Regulations.

Schedule 1 of the Regulations implements the Fiji Agreement and commences on the day that the SOFA with Fiji comes into force. Article 24 of the Fiji SOFA provides that the Agreement enters into force upon 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.

Schedule 2 of the Regulations implements the Timor-Leste Agreement and commences on the day that the SOFA with Timor-Leste comes into force. Article 5 of the Timor-Leste SOFA provides that the Agreement enters into force upon 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.

If either SOFA comes into force before the Regulations are registered on the Federal Register of Legislation, the Regulations commence on the day after registration. If a SOFA does not come into force within 18 months of the Regulations being registered, the relevant Schedule will not commence at all.

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 relating to Fiji

Migration Regulations

Item [1] – 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 word “Fiji,” after “Australia and,” to include Fiji 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 Fiji, for the purposes of the SOFA between Australia and Fiji, 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 Fiji.

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 (SPV) to travel to, enter and remain in Australia under subsection 33(2) of the Migration Act while they have the prescribed status.

Prescribing Fijian civilian component members as a class of persons who have a prescribed status for the purposes of holding a SPV gives effect to Article 7 of the Fiji Agreement.

This amendment also has a consequential effect on paragraph (a)(iv) of the definition of *foreign armed forces dependant* in regulation 1.03. The effect of this amendment is to include dependant family members of the Fijian forces civilian component members as having a prescribed status so that they are also taken to be granted a SPV to enter and remain in Australia for purposes of the SOFA between Australia and Fiji.

Item [2] – 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 word “Fiji,” after “Australia and,” to include Fiji in the definition of *SOFA forces member*.

The effect of this amendment is to include a person who is a member of the Republic of Fiji Military Forces for the purposes of the SOFA between Australia and Fiji, 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 Fiji.

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 SPV to travel to, enter and remain in Australia under subsection 33(2) of the Migration Act while they have the prescribed status.

Prescribing Fijian forces members as a class of persons who have a prescribed status for the purposes of holding a SPV gives effect to Article 7 of the Fiji Agreement.

This amendment also has a consequential effect on paragraph (a)(iii) of the definition of *foreign armed forces dependant* in regulation 1.03. The effect of this amendment is to include dependant family members of the Fijian armed forces as having a prescribed status so that they are also taken to be granted a SPV to enter and remain in Australia for the purposes of the SOFA between Australia and Fiji.

Schedule 2 – Amendments relating to Timor-Leste

Migration Regulations

Item [1] – 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 word “Timor-Leste,” after “Singapore,” to include Timor-Leste 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 Timor-Leste, for the purposes of the SOFA between Australia and Timor-Leste, 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 Timor-Leste.

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 SPV to travel to, enter and remain in Australia under subsection 33(2) of the Migration Act while they have the prescribed status.

Prescribing Timor-Leste civilian component members as a class of persons who have a prescribed status for the purposes of holding a SPV gives effect to Annex 1, Article 4 of the Timor-Leste Agreement.

This amendment also has a consequential effect on paragraph (a)(iv) of the definition of *foreign armed forces dependant* in regulation 1.03. The effect of this amendment is to include dependant family members of Timor-Leste forces civilian component members as having a prescribed status so that they are also taken to be granted a SPV to enter and remain in Australia for the purposes of the SOFA between Australia and Fiji.

Item [2] – 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 word “Timor-Leste,” after “Singapore,” to include Timor-Leste in the definition of *SOFA forces member*.

The effect of this amendment is to include a person who is a member of the Forças de Defesa de Timor-Leste (F-FDTL) for the purposes of the SOFA between Australia and Timor-Leste, 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 Timor-Leste.

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 SPV to travel to, enter and remain in Australia under subsection 33(2) of the Migration Act while they have the prescribed status.

Prescribing Timor-Leste forces members as a class of persons who have a prescribed status for the purposes of holding a SPV gives effect to Annex 1, Article 4 of the Timor-Leste Agreement.

This amendment also has a consequential effect on paragraph (a)(iii) of the definition of *foreign armed forces dependant* in regulation 1.03. The effect of this amendment is to include the dependant family members of the Timor-Leste armed forces members as having a prescribed status so that they are also taken to be granted a SPV to enter and remain in Australia for the purposes of the SOFA between Australia and Timor-Leste.