

# **DEFENCE (VISITING FORCES) AMENDMENT REGULATIONS 2023**

## **EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

under section 30 of the *Defence (Visiting Forces) Act 1963*

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

Section 30 of the *Defence (Visiting Forces) Act 1963* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Paragraph 16(2)(b) of the Act provides that the regulations may, subject to any prescribed conditions, confer on a visiting force (including its members, its service tribunals, persons in any way connected with a visiting force, or property used or to be used for the purposes of a visiting force) any privilege or immunity specified in the regulations, being a privilege or immunity that would be enjoyed by, or would be capable of being conferred on, the force (including its members, its service tribunals, such persons or such property) if the force were a part of the Defence Force.

The Defence (Visiting Forces) Amendment Regulations 2023 (the Regulations) amend the *Defence (Visiting Forces) Regulations 1963* (the Principal Regulations) to give effect to Australia's treaty obligations with Japan. On 6 January 2022, Australia and Japan signed the *Agreement between Australia and Japan Concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Force of Japan* (the Agreement). The Agreement is a bilateral visiting forces agreement which provides a framework to govern the status of Australia and Japan's forces while conducting cooperative activities in each other's territories.

The text of the Agreement is publicly available on the Department of Foreign Affairs and Trade's [Australian Treaties Database](#).

The Regulations extend the following immunities from Australian State and Territory laws conferred by section 123 (1) of the *Defence Act 1903* (the Defence Act) on members of the Australian Defence Force (and already conferred on members of visiting forces by regulation 6(2) of the Principal Regulations) to members of the civilian component of a visiting force of Japan:

- those immunities in section 123(1)(a) of the *Defence Act 1903* relating to the use, possession or registration of a vehicle; and
- those immunities in section 123(1)(b) for the *Defence Act 1903* relating to permissions (in the form of a licence or otherwise) to perform official duties.

The Regulations also exempt members of a visiting force of Japan and members of a civilian component of such a visiting force from any State or Territory law that would require them to register or to have permission (whether in the form of a licence or otherwise) to have in their use or possession a vehicle hired or leased by Japan.

In addition, the Regulations extend certain investigative powers under the *Defence Force Discipline Act 1982* (DFDA), with the effect that persons or authorities empowered under the DFDA to conduct certain investigative activities can, in Australia, and at the request of Japan, conduct those activities in respect of a member of the visiting force of Japan, including certain members of the civilian component of that visiting force.

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

The Regulations commence on the later of the day after the instrument is registered on the Federal Register of Legislation or the day the Agreement comes into force for Australia.

Details of the Regulations are set out in [Attachment A](#).

## **CONSULTATION**

Consultations have occurred with the Department of Defence and the Department of Foreign Affairs and Trade. A public consultation process was not held as these regulations implement the obligations contained in the Agreement which was itself the subject of a consultation process through the Joint Standing Committee on Treaties inquiry, which recommended that the Government take binding treaty action.

## **POLICY IMPACT ANALYSIS**

The Office of Impact Analysis, Department of Prime Minister and Cabinet, was consulted in relation to the Regulations and advised that, based on the information provided, the proposal was unlikely to have more than a minor impact and, as such, the preparation of a Policy Impact Analysis was not required.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

The Regulations are 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*. A Statement of Compatibility with Human Rights is at [Attachment B](#).

**Details of the *Defence (Visiting Forces) Amendment Regulations 2023***

Section 1 - Name of Regulations

This section provides that the title of the Regulations is the *Defence (Visiting Forces) Amendment Regulations 2023* (the Regulations).

Section 2 - Commencement

This section provides for the instrument to commence on the later of:

- the day after the instrument is registered on the Federal Register of Legislation; or
- the day 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*, done at Canberra and Tokyo on 6 January 2022 (the Agreement), comes into force for Australia.

The provisions will not commence if the Agreement is never entered into force for Australia.

Section 3 - Authority

This section provides that the Regulations are made under the *Defence (Visiting Forces) Act 1963* (the Act).

Section 4 - Schedule(s)

This section 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.

Schedule 1 – Amendments

Extension of immunities and license recognition to members of the civilian component of Japan’s Visiting Forces for driving official vehicles and conducting official duties in Australia

Article 10(1) of the Agreement requires Australian authorities to recognise driving permits and licences issued by Japanese authorities to members of the Japanese visiting force and any civilian component for the purposes of driving official vehicles in Australia.

Article 11(1) of the Agreement requires Australia to allow members of the Japanese visiting force and any civilian component to conduct their official duties in Australian territory, even where doing so would typically require the individual to have permission (whether in the form of a licence or otherwise).

Subsection 123(1) of the Defence Act applies to the Australian Defence Force (the Defence Force). It provides immunities for members of the Defence Force from the requirements of each State and Territory of Australia in relation to licensing and registration of certain Commonwealth owned equipment, or licensing requirements in respect of activities done by

members of the Defence Force in the course of their duties as a member of the Defence Force.

Items 1 to 4 below address these obligations.

Item [1] – Subregulation 6(3)

This item omits ‘Singapore or Papua New Guinea’ from subregulation 6(3) and substitutes it with ‘Singapore, Papua New Guinea or Japan’.

The effect of this item is to extend the immunities conferred on the Defence Force in subsection 123(1) of the Defence Act, as they relate to the use, possession or registration of a vehicle, to include members of a civilian component of the visiting force of Japan. These immunities have already been extended to include the civilian component of visiting forces of the United States of America, Singapore and Papua New Guinea in this subregulation.

Item [2] – Paragraph 6(4)(a)

This item inserts ‘or Japan’ after ‘America’ in paragraph 6(4)(a).

The effect of this item is to extend the licensing and registration immunities conferred on the Defence Force in subsection 123(1) of the Defence Act to allow members of the visiting force, and the civilian component, of Japan to drive official vehicles, including those on hire or lease to Japan, without an Australian State or Territory drivers licence. This immunity has already been extended to include members of a visiting force and the civilian component of the United States of America, as referred to in paragraph 6(4)(b).

Item [3] – Subregulation 6(4)

This item omits ‘by the United States of America’ and substitutes ‘by the sending country in relation to the visiting force’ in subregulation 6(4).

The effect of this item is to reflect the amendment in item [2] above, which extended certain immunities to allow members of the visiting force, and the civilian component, of Japan to drive official vehicles on hire or lease to Japan without an Australian State or Territory drivers licence. The inclusion of the words ‘the sending country in relation to the visiting force’ ensures all sending countries referred to in paragraph 6(4)(a), namely United States of America and Japan, are included.

Item [4] – Subregulation 6(5)

This item repeals current subregulation 6(5) and substitutes new subregulations 6(5) and 6(6).

New subregulation 6(5) provides that, for the purposes of paragraph 16(2)(b) of the Act, the immunities conferred on members of the Defence Force by paragraph 123(1)(b) of the Defence Act are conferred on members of the civilian component of a visiting force of Japan. This item operates as if references to the Defence Force in subsection 123(1) of the Defence Act were references to the civilian component of a visiting force of Japan.

The effect of new subregulation 6(5) is to extend the immunities conferred by paragraph 123(1)(b) of the Defence Act to members of the Defence Force, to members of the civilian component of a visiting force of Japan.

The purpose of this subregulation is to ensure members of the civilian component of a visiting force of Japan are able to carry out their official duties free of the licensing requirements under the laws of relevant States and Territories in a manner similar to that which applies to members of the Defence Force, and to members of the visiting force of Japan under current Regulation 6(2).

New subregulation 6(6) provides that subregulations 6(2), (3), (4) and (5) do not limit each other. This new subregulation is in a form similar to the repealed previous subregulation 6(5).

Extension of certain powers of investigation under the Defence Force Discipline Act 1982 exercisable by the Australian Defence Force, against members of the visiting forces of Japan and civilian component.

Article 21(6) of the Agreement, supported by implementing arrangements, obliges Australia to assist Japan to investigate certain offences alleged to be committed by members of the visiting force of Japan, or the civilian component, while operating in Australian territory. Currently, there is no provision under the Act or the Principal Regulations to extend the ability of persons authorised to conduct investigative activities under the *Defence Force Discipline Act 1982* (DFDA), to members of a visiting force or the civilian component. To give full effect to Australia's obligation to assist Japan under the Agreement and implementing arrangements, regulations to extend these powers are required.

Part VI of the DFDA authorises certain members of the Defence Force to conduct investigative activities in respect of alleged service offences (being offences under the DFDA) committed by members of the Defence Force and defence civilians, as defined in the DFDA.

Item [5] – After regulation 12

This item inserts new regulation 13 '*Extension of investigative powers to visiting force of Japan*' after regulation 12.

The effect of new regulation 13 is to extend the authorisations in Part VI of the DFDA to empower relevant persons or authorities to conduct investigative activities in respect of members of a visiting force of Japan, including the civilian component of that force, where the alleged offence against Japanese law has an equivalent in the DFDA, and where that investigation is requested by Japan.

New regulation 13 is intended to give effect to Australia's obligations under the Agreement and its implementing arrangements, and reciprocate the agreed process that applies to members of a visiting force of Australia when visiting Japan. The new regulation does not otherwise alter the operation of the investigative powers that exist in Part VI of the DFDA, nor the rights or protections conferred by that Part.

The new regulation contains three subregulations.

### *Members of a visiting force of Japan*

New subregulation 13(1) provides that, for the purposes of subsection 16(1) of the Act, a power that would be exercisable, with respect to a member of the Defence Force, under Part VI of the DFDA by an authority or person, is exercisable by that authority or person with respect to a member of a visiting force of Japan, provided that the power is exercised for the purposes of investigating an offence against Japanese law that is equivalent to an offence under the DFDA, and Japan requests that investigation.

### *Members of a civilian component of a visiting force of Japan*

New subregulation 13(2) replicates 13(1) but applies it to members of the civilian component of a visiting force of Japan. Subregulation 13(2) adds that the power is only exercisable in respect of an offence against Japanese law that is equivalent to a DFDA service offence that can be committed by an Australian defence civilian, and is subject to Japan requesting the investigation and advising Australia that the member of the civilian component is subject to the jurisdiction of a Japanese service tribunal.

### *Definitions*

New subregulation 13(3) provides definitions for the following terms in these regulations with reference to the DFDA: defence civilian, Defence Force Discipline Act service offence and defence member.

**Statement of Compatibility with Human Rights**

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

**Defence (Visiting Forces) Amendment Regulations 2023**

This 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 Legislative Instrument**

The Defence (Visiting Forces) Amendment Regulations 2023 (the Regulations) amend the *Defence (Visiting Forces) Regulations 1963* (the Principal Regulations) to implement Australia's obligations under *Agreement between Australia and Japan concerning the facilitation of reciprocal access and cooperation between the Australian Defence Force and the Self-Defense Force of Japan* (the Agreement), supported by implementing arrangements.

Article 10(5) of the Agreement requires Australian authorities to recognise driving permits and licences issued by Japanese authorities to members of the visiting force of Japan and any civilian component for the purposes of driving official vehicles, including vehicles hired or leased by Japan.

Article 21(6) of the Agreement, supported by implementing arrangements, obliges Australia to assist Japan to investigate certain offences alleged to have been committed in Australia by members of a visiting force of Japan, including certain members of the civilian component.

The Regulations implement these provisions of the Agreement to allow members of the civilian component of Japan's visiting force to operate official vehicles, including those on hire or lease, in Australia without a recognised Australian licence. The Regulations also extend certain investigative powers under the *Defence Force Discipline Act 1982* (DFDA), with the effect that persons or authorities empowered under the DFDA to conduct investigative activities, can conduct those activities in respect of a member of a visiting force of Japan, including certain members of the civilian component of that visiting force, if Japan requests the investigation.

The range of investigative powers that may be exercised by persons or authorities under Part VI of the DFDA in respect of a member of a visiting force of Japan, including certain members of the civilian component of that visiting force, include:

- powers for an investigating officer who is investigating a 'service offence' to question a person (s 101B of the DFDA);
- powers to take fingerprints, photographs and other samples from a person who is in lawful custody in respect of a 'service offence' (s 101L of the DFDA); and
- powers to search and seize evidence in relation to a 'service offence' (s 101W of the DFDA).

These powers may be engaged to investigate ‘service offences’ (which are defined by s 3(1) as offences under that Act or its regulations), thus these powers would only be engaged where the alleged offence against Japanese law has an equivalent in the DFDA.

### **Human Rights Implications**

The Regulation extends the application of the investigative powers under the DFDA to a member of a visiting force of Japan, including certain members of the civilian component of that visiting force, if Japan requests the investigation. Importantly, the investigative powers would operate with respect to members of the Japanese visiting force in the same way that they operate with respect to Australian Defence Force members and others who are subject to the operation of the DFDA.

The existing investigative powers under the DFDA engage a number of rights under the International Covenant on Civil and Political Rights (ICCPR), including:

- the right to a fair trial under Article 14 of the ICCPR. This includes the principles of:
  - a fair hearing by a competent, independent and impartial tribunal,
  - the presumption of innocence (with the application of appropriate burdens of proof and legal defences), and
  - minimum guarantees in criminal proceedings (such as appropriate charges, qualified legal representation, appropriate penalties);
- freedom from arbitrary detention under Article 9 of the ICCPR;
- the right to humane treatment whilst in detention under Article 10 of the ICCPR; and
- the right to privacy under Article 17 of the ICCPR.

The Regulation’s extension of Part VI investigative powers may impact on the rights of individuals, but only does so when there is suspicion of a service offence, within specified limits, and when Japan has requested that the Australian Defence Force exercise DFDA investigative powers with respect to its own visiting force and civilian component. Where persons or authorities empowered under the DFDA conduct investigative activities under Part VI, the DFDA contains a range of safeguards and protections to ensure that the rights of individuals are protected.

The DFDA places limits on the investigative powers that may be exercised under the Act. For example, the DFDA places limits on when searches of a person or their property may be conducted (s101W(1)). Part VI also provides protections from arbitrary interference with privacy. For example, by specifying who may exercise DFDA investigative powers, how and on what basis; and applies the protections equally to all those subject to DFDA investigative powers. Although the Regulation only extends the investigative powers of Part VI of the DFDA (and does not extend the provisions of the Act covering the powers of arrest and detention, or service tribunals), the DFDA provides assurance for the presumption of innocence in later proceedings, for example, through the right of individuals not to answer questions notwithstanding that an investigating officer has authority to ask them (s101B).

The Regulation does not extend powers of arrest and detention to a Japanese visiting force, which would be exercised instead in accordance with sections 8 and 12 the *Defence (Visiting Forces) Act*.



The Regulations do not alter any of the human rights safeguards that are already contained in Part VI of the DFDA.

**Conclusion**

The Regulation is compatible with human rights.

**The Hon Mark Dreyfus KC**

**Attorney-General**