



Australian Government

Defence

■ Reforming Defence legislation to meet Australia's strategic needs

Consultation paper

March 2023



Acknowledgement of Country

Defence acknowledges the Traditional Custodians of the lands, seas and air in which we live, work and train. We pay our respects to their Elders past and present. We also pay our respects to the Aboriginal and Torres Strait Islander men and women who have contributed to the defence of Australia in times of peace and war.

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Consultation process

Interested stakeholders are invited to comment on the issues raised in this paper by 21 April 2023.

Submissions may be lodged through the Defence website using the following link:

www.defence.gov.au/about/reviews-inquiries

For accessibility reasons, responses should be submitted in Word or PDF format.

All information in submissions (including names) may be made publicly available on the Defence website at the conclusion of the consultation process unless you indicate that you would like all or part of your submission to remain in confidence. Individuals and organisations may request to have their submission published anonymously or not published at all.

If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment. Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

Closing date for submissions: 21 April 2023

Make submissions at: www.defence.gov.au/about/reviews-inquiries

Enquiries: Enquiries can be directed to rdl.submissions@defence.gov.au

Introduction

Reforming Defence legislation to meet Australia's strategic needs

The Australian Government is committed to ensuring Defence is able to meet the challenges of a rapidly changing strategic environment and realities of modern competition and armed conflict.

In this context, Defence is developing policy options to modernise the *Defence Act 1903* (Defence Act) and related legislation to enable Defence to be more agile, operationally effective and responsive in an increasingly complex and dynamic strategic environment.

Three key initiatives are being considered, which will:

- support the full range of military activities and capabilities required to defend Australia and its national interests
- enhance the capacity for interoperability with our international allies and partners
- improve the security of Australia's military capabilities.

These reforms will support capabilities operating across the breadth of modern operational domains (including cyber and space) and the role of advanced and emerging capabilities.

Reform is necessary in a changing strategic environment

Defence requires an agile, scalable and future-focused legal framework to effectively shape Australia's strategic environment, deter actions against the national interest and, when required, respond swiftly with military force.

The Defence Act and related legislation need to be modernised to keep pace with advanced and emerging capabilities and new technologies, and respond to current and future challenges.

A range of factors are impacting the effectiveness of existing laws.

Strategic competition

Australia is increasingly faced with challenges to our national interests and regional security and stability, including a complex strategic environment of competition and coercion. Defence operates in a more ambiguous environment, where unconventional activities are increasingly being adopted to challenge sovereignty and habits of cooperation. Australia's ability to operate effectively in this environment, including as part of Government-directed operations in less-than-conflict scenarios, requires appropriate projection of military power and use of Defence capabilities.

Strategic uncertainty

Australia can expect reduced warning times ahead of any armed conflict. This means that Defence can no longer assume that there will be time to gradually adjust military capability and preparedness in response to emerging challenges. It is paramount that Defence is prepared to meet future challenges.

Increasing domestic regulation

Recent decades have seen increasing regulation at all levels of government, which regulate a diverse range of activities and vary significantly between jurisdictions. In some cases, the impact of these laws can have unforeseen consequences on Defence activities and capabilities, constraining Defence in unintended, or unpredictable ways.

New and emerging technologies

Defence is increasingly required to use and defend against new and emerging technologies critical to modern warfare and in other Defence activities. For example, cyber and electronic effects, as well as quantum and artificial intelligence, and other advanced capabilities. New technologies are often fused and integrated with a range of platforms and assets, and this convergence is not adequately accounted for in existing legal frameworks.

Changing character of warfare

The character of war has evolved, from traditional kinetic combat activities to the expanded incorporation of operational activities in the cyber, information and space domains.

Globalisation

Globalisation continues to change and expand traditional geographic boundaries. Electronic and cyber capabilities can be used to generate effects across borders, through different jurisdictions from which they are employed, on a global scale. As Defence increasingly relies on global networks and supply chains to maintain critical capabilities, protection of these networks and ensuring appropriate interoperability with foreign partners is essential.

Key reform initiatives

Three key initiatives are being considered to better enable Defence as a modern, agile and operationally effective war-fighting enterprise.

Initiative 1: Support the full range of military activities and capabilities required to defend Australia and its national interests

This initiative will ensure that the domestic legal framework supports the full range of activities needed to generate, sustain and use Defence capabilities in order to defend Australia and its national interests.

Initiative 2: Design the law for interoperability with international allies and partners

This initiative will ensure that the domestic legal framework better supports interoperability between Defence and Australia's international partners, allowing Defence to learn, collaborate and achieve far more collectively than it could on its own.

Initiative 3: Improve the security of Australia's military capabilities

This initiative will enable a more comprehensive approach to defence security, shifting the focus of the legal framework from security of defence premises to security of defence capabilities (tangible and intangible).

Guiding principles for reform

The reforms will be underpinned by the following guiding principles:

Focused

Legislative change must be focused. The reforms will position Defence as an agile, integrated, war-fighting enterprise. They will focus on those aspects of the domestic legal framework that directly enable Defence's core mission, and the evolution and use of Defence capabilities, activities and operations in support of that mission.

Flexible

Legislative change must support flexibility. The reforms will result in a technology-neutral legislative framework that enables Defence to rapidly evolve and enhance its capabilities, activities and operations in a dynamic strategic environment. The legislation should avoid prescription as far as possible, reducing rigid and inflexible approaches to the conduct of Defence activities.

Fit for purpose

Legislative change must be fit for purpose. The reforms will optimise relevant legislation to support Defence's responses to Australia's current and emerging security challenges. They will be adapted to modern approaches to warfare, and the rapidly evolving technological landscape. The legislation will be fit for purpose, setting Defence up for the future.

Out of scope matters

The reforms are targeted to enabling Defence as an agile, integrated, war-fighting enterprise. Other matters in Defence legislation and relating to other national security or law enforcement apparatus are out of scope. Matters out of scope include:

- Defence assistance to civil authorities and the community, including Part IIIAAA of the Defence Act
- Australian Defence Force (ADF) conditions of service
- Compensation for serving and former ADF members, including the *Military Compensation and Rehabilitation Act 2004*
- Liability to serve in the ADF, including Part IV of the Defence Act
- Decision-making in relation to entry into armed conflict (at time of writing, this is subject of a parliamentary inquiry: [Inquiry into international armed conflict decision making – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au))
- ADF discipline matters, including the *Defence Force Discipline Act 1982*
- Intelligence services legislation
- *Defence Trade Controls Act 2012*
- Planned legislation in relation to former ADF members working for foreign militaries.

Initiative 1: Support the full range of military activities and capabilities required to defend Australia and its national interests

Defence's mission is to defend Australia and its national interests in order to advance Australia's security and prosperity.

Australia deploys military power to shape our strategic environment, deter actions against Australia's interests and, when required, respond with credible military force. To achieve these strategic goals, Defence must continuously enhance its capability as a war-fighting enterprise.

In this context, the domestic legal framework must support the full range of activities needed to generate, sustain and use Defence capabilities. However, as identified above, the law requires modernisation to better address current and future strategic threats.

Defence is seeking your views on how to amend Defence legislation to better support the full range of Defence activities needed to defend Australia, in a changing strategic context. Key areas of concern are:

Protecting and defending Australia in situations below the threshold of armed conflict

Ensuring the law allows Defence to, with appropriate authorisation and Government direction, act to protect and defend Australia from adverse outcomes in situations below the threshold of armed conflict, as well as during armed conflict. This is of increasing importance in a strategic environment characterised by 'grey-zone' activities, and where actions and effects are difficult to attribute or where public attribution is not desirable.

Allowing Defence to 'train as we fight'

Ensuring the law allows Defence to train in Australia in as close a simulation to real-life operations as possible. This can involve the use of the full range of capabilities, incorporating modern technologies, to ensure that Defence personnel understand and are properly prepared for all activities they may be directed to undertake. Training is a critical component of Defence preparedness, to raise a military force and rapidly mobilise if necessary.

Supporting innovation and technology development

Ensuring the law allows Defence to innovate, develop, test and deploy new technologies and capabilities quickly. Modern military operations are characterised by constantly evolving technologies, including cyber and electronic effects, artificial intelligence, and quantum technologies. Rapid introduction of new key capabilities will be critical to Defence preparedness.

Enabling information and data reliant capabilities

Ensuring the law allows Defence to access and share information appropriately to support Defence activities. Defence is increasingly reliant on information-based technologies and activities to generate strategic advantage. This requires the ability to appropriately access, store and use large amounts of data, including to support technologically-enhanced command and control decision-making.

Clarifying interaction with other domestic laws

Ensuring the law is clear on the application of state and territory laws to Defence activities. Defence activities conducted in Australia are subject to the operation of some state and territory laws, which meet important public policy objectives. In some cases, however, unintended consequences of those laws have constrained proper Defence activities, including training and capability development. Critical Defence activities will be supported by clarification of the circumstances in which state and territory laws do not apply to them.

Additional considerations

A number of important matters must be considered when developing legislation to address these issues.

- This initiative relates to activities conducted for defence purposes only, and will not be making changes to the broader national security apparatus or supporting any expansion of Defence's role.
- Defence activities supported by this initiative must be for a legitimate defence purpose, and any impact on the Australian population must be reasonable and proportionate.
- Defence must be accountable to the Government and Australian people, and legislation developed in this initiative must incorporate appropriate safeguards to support accountability.
- It is critical that Defence can act flexibly and remain responsive as strategic circumstances change and new technologies and capabilities are developed.

Consultation questions

1. How could the Defence Act better support the range of military activities and capabilities required in the modern world? How could Defence legislation be improved to meet this goal?
 2. What safeguards do you consider should be included to ensure the law supports Defence accountability?
 3. What legislative changes are required to support innovation and technology development in Defence?
 4. What Commonwealth laws could be changed to enable Defence's ability to train and operate effectively?
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Initiative 2: Design the law for seamless interoperability with international allies and partners

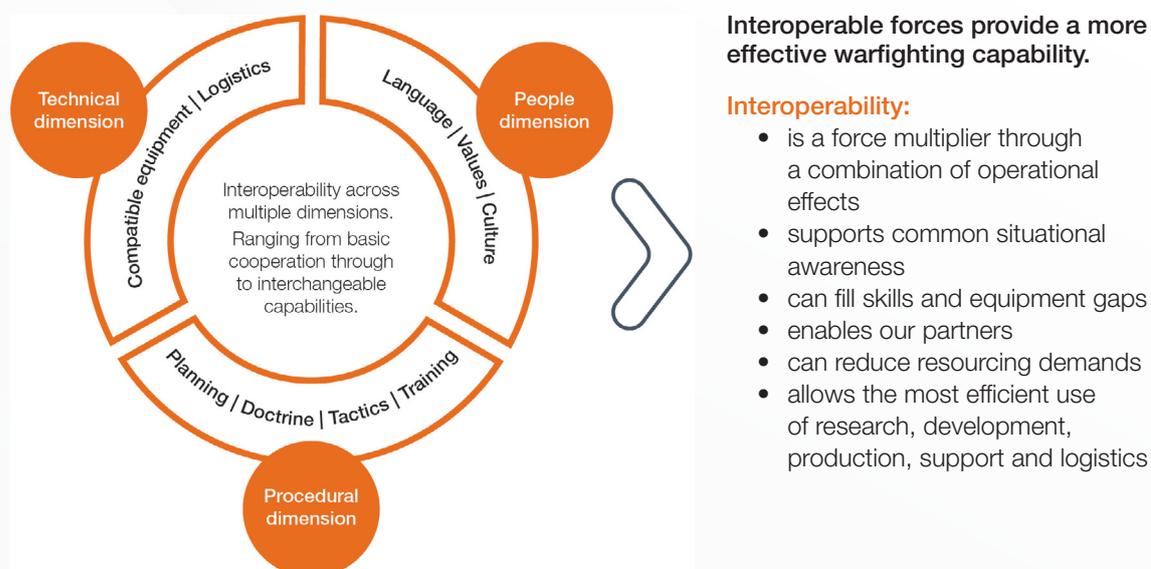
The strategic challenges Australia faces are global in scope and highly complex. These challenges require broad cooperation and deep coordination with our international allies and partners.

Interoperability refers to Defence's ability to work together with its international allies and partners to achieve shared objectives.

Critical to Defence's ability to adjust, adapt, develop and strengthen its capability is the ability to engage with and host individual members and foreign military forces in Australia. The benefits to Defence capability achieved through the skill, knowledge and experience gained from interacting with and hosting foreign military forces is immeasurable.

Seamless and effective interoperability enables Defence and its partners to achieve far more collectively than is possible on their own (see Figure 2.1).

Figure 2.1. Understanding interoperability



Defence's engagement with international allies and partners, including joint exercises and operations, is critical to our regional stability and security objectives. Future legislation should support this engagement by enabling interoperability with international allies and partners, including more flexible approaches when hosting foreign personnel and equipment in Australia.

Defence is seeking your views on how to design Defence legislation to better support effective interoperability between Defence and its international allies and partners. Key areas of concern include:

Supporting timely information exchange

Ensuring that the law enables Defence and its international allies and partners to quickly and appropriately share information, including in training, technology development and operational contexts. Information sharing underpins successful interoperability, and relies on trust, across the whole spectrum from basic cooperation through to interchangeable capabilities. This requires consideration of the broader information law environment, including where there are existing legal obligations to disclose information or which prohibit disclosure.

Enabling foreign forces in Australia

Ensuring that the law provides a flexible and adaptable mechanism to appropriately extend legal frameworks supporting Defence activities to also support activities by our international allies and partners in Australia. This is a critical requirement as we increase our reliance on shared supply chains and logistics functions, and will modernise and build on existing mechanisms such as section 16(2) of the *Defence (Visiting Forces) Act 1963*.

Additional considerations

When modernising frameworks for foreign forces, it will be critical to ensure that there is no impact on the ability to comply with existing agreements with international allies and partners.

Consultation questions

5. What are some options for improving Defence legislation to better support interoperability with international partners?
 6. How could Defence legislation be improved to better provide for information sharing with international counterparts, in the context of the broader legal landscape regulating information and data?
 7. In what circumstances is it appropriate to extend Defence's authorities to members of foreign forces who are in Australia?
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Initiative 3: Improve the security of Australia's military capabilities

Flexible and robust security is critical to Defence's success. This involves protecting Defence people, assets, activities and information from a range of threats, including espionage and foreign interference, insider threats, terrorism and serious and organised crime.

Defence security sits within a broader framework encompassing law enforcement and national security elements. In this context, a range of general law and whole-of-Government frameworks support defence security, including:

- offences relating to espionage, foreign interference, cybercrime, disclosure of information
- industry obligations under the security of critical infrastructure framework
- restrictions on foreign acquisitions and takeovers
- prohibitions on entry or access to premises, including trespass offences.

Existing defence legislation provides additional protections for defence capabilities, with a particular focus on physical security of defence premises (see Figure 3.1).

The legal framework for defence security needs to address tangible and intangible aspects of security, and in an environment where Defence capabilities are inextricably linked with Defence's industrial base and international partners.

Defence is seeking your views on how to augment the existing legal framework to better support security of Defence capabilities in this context. Key areas of concern include:

Focusing on security of defence capabilities, rather than defence premises only

Ensuring the law allows protections to be extended outside of Defence-controlled areas, reducing the reliance on geographic isolation and perimeter security. This includes in relation to assets or interests outside of the defence estate, threats that originate outside the perimeter, and assets or capabilities when in transit (such as information stored in commercial servers or military assets that need to be moved or located between premises).

Enhancing options for proactive identification of security threats

Ensuring the law enables Defence to identify and address security threats proactively, as opposed to taking action after a security event has occurred. For example, proactive monitoring in identified high-risk contexts could reduce the risk of security breaches with a significant impact on Defence capabilities. Investigation and prosecution after a security event may be too late to prevent critical damage from occurring.

Improving protection for defence partners, including defence industry partners and international partners in Australia

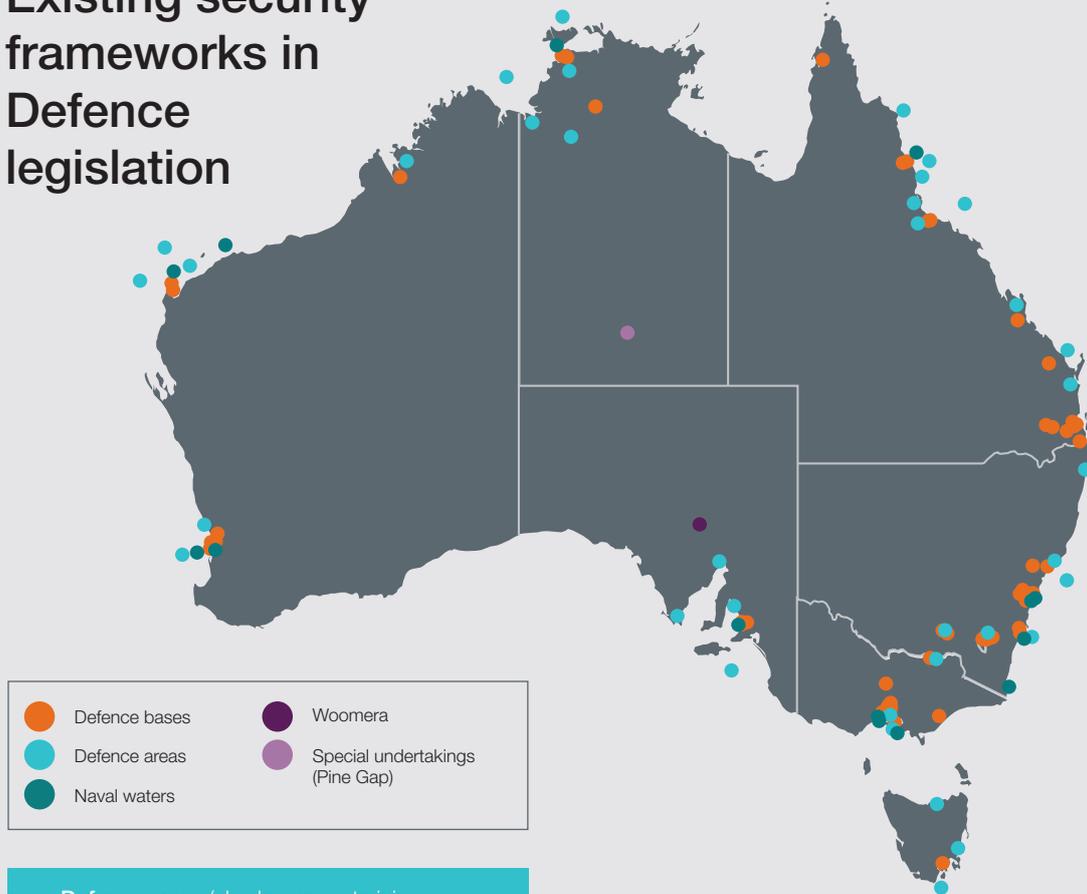
Ensuring the law allows protections to be provided in relation to defence partners, including defence industry partners and international partners in Australia. This reflects the reality of operating in an increasingly connected world of information flow and storage, and in a context where seamless interoperability with our international partners is increasingly critical.

Supporting cyber and information security

Ensuring the law provides sufficient authority to address threats to cyber and information security, and other intangible threats arising from new and emerging technologies.

Figure 3.1. Existing security frameworks in Defence legislation

Existing security frameworks in Defence legislation



Defence areas (also known as training areas) are declared under Part 11 of the *Defence Regulation 2016*. Defence areas can be declared over land, sea or airspace in or adjacent to Australia, including both Commonwealth and non-Commonwealth land. Entry into a defence area can be prohibited at all times, or during specified periods only. A range of powers are prescribed to support physical security of activities in defence areas, including powers to remove people and vehicles from the area.

Defence special undertakings and associated prohibited areas can be declared under the *Defence (Special Undertakings) Act 1952*. The only currently declared prohibited area is the Joint Defence Facility Pine Gap. A range of offences with significant penalties apply in relation to prohibited areas, including entry without a permit, obtaining information about a prohibited area, sabotage, and failure to follow directions.

Entry to the **Woomera Prohibited Area** is managed through a permit scheme under Part VIB of the *Defence Act 1903*. Access by pastoralists, indigenous owners, the South Australian government and the Tarcoola to Darwin railway is governed by the *Defence Force Regulations 1952*, rather than the permit scheme. Decisions to grant or refuse permits, or grant a permit with conditions, may include consideration of defence security issues.

Naval waters are areas of sea and foreshore within 5 nautical miles of a naval installation proclaimed under the *Control of Naval Waters Act 1918*. Defence is able to regulate access and impose conditions on vessels in proclaimed naval waters.

Part VIA of the *Defence Act 1903* provides for **security of defence premises**, applying to premises owned or occupied by the Commonwealth for use by the ADF (that is, the defence estate). Part VIA includes search and seizure powers, with a focus on physical security at entry points.

Part VII of the *Defence Act 1903* includes some **information offences** relevant to defence security. In particular, offences for unlawfully giving or obtaining information as to defences and making images of defence installation

Additional considerations

A number of important matters must be considered when developing legislation to support defence security.

- The respective roles of police, the Defence workforce, defence industry, intelligence and security agencies and others in relation to defence security must be understood and respected, while allowing some flexibility to adjust these roles when circumstances change.
- Defence legislation should avoid duplicating existing legislative frameworks, focusing on ensuring any gaps specific to Defence security risks are filled.
- It is critical to balance the need for security against the need for transparency, applying a proportionate approach to security risks.

Consultation questions

8. How could Defence, law enforcement, intelligence agencies, defence industry contribute to providing enhanced security for Defence capabilities?
 9. What are some ways Defence legislation can promote and support a proactive and risk-conscious approach to security threats?
 10. What are some options to ensure Defence and its partners in defence industry can work together to protect critical Defence capabilities?
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