

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence

Defence Act 1903

Defence (Declared Explosive Ordnance Depots) Instrument 2022

Part VIA of the *Defence Act 1903* (the Defence Act) contains a framework to protect the security of defence premises. It was inserted into the Defence Act in October 2011 to enhance the security of Defence bases, facilities, assets and personnel within Australia in response to the changing nature of security threats. Relevantly, Subdivision B of Division 3 makes provision in relation to ‘declared explosive ordnance depots’.

A specified area of land or any other place (whether or not it is enclosed or built on), or a building or other structure, is a declared explosive ordnance depot if it is specified in an instrument in force under subsection 71L(2) and signs stating that it is a condition of entry to the area of land or the place, building or structure that a person undergo searches as provided by Subdivision B of Division 3 of Part VIA of the Defence Act are prominently displayed at its entrance and at regular intervals around its perimeter (subsection 71L(1)).

Subsection 71L(2) of the Defence Act provides that the Minister may, by legislative instrument, specify an area of land or any other place (whether or not it is enclosed or built on), or a building or other structure for the purposes of subsection 71L(1) if:

- a) the area of land or the place, building or structure is defence premises used wholly or partly for the storage of explosive ordnance; and
- b) members of the Defence Force are not normally present at the area of land or the place, building or structure.

Subsection 71L(3) provides that the instrument may specify more than one area of land, place, building or structure. Subsection 71L(4) provides that each area of land, place, building or structure specified in an instrument under subsection 71L(2) must be specified by reference to one of the following:

- a) its geographical location;
- b) a unique code or number.

Subsection 71L(5) provides that if an area of land or a place, building or structure is specified by a unique code or number, the code or number must correspond with a code or number that is held in the records of the Department as a code or number applicable to that area of land or that place, building or structure.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make an instrument of a legislative character the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

The purpose of the *Defence (Declared Explosive Ordnance Depots) Instrument 2022* (the 2022 Instrument) is to repeal and replace the *Defence (Declared Explosive*

Ordnance Depots) Instrument 2012 (the 2012 Instrument), which is due to sunset on 1 October 2022 in accordance with Part 4 of Chapter 3 of the *Legislation Act 2003*.

The 2022 Instrument specifies the same areas of land or the places, buildings or structures, by reference to a unique code (which is held in the records of the Department) that were specified in the 2012 Instrument.

The areas of land or the places, buildings or structures specified in the 2022 Instrument are defence premises used wholly or partly for the storage of explosive ordnance and at which members of the Defence Force are not usually present.

The 2022 Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

The 2022 Instrument commences on the day after it is registered on the Federal Register of Legislation.

Consultation

In identifying the declared explosive ordnance depots under section 71L, consultation was undertaken with Thales who is the Defence contractor managing the various explosive ordnance depots on behalf of Defence.

Regulatory Impact Statement

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required (ID: OBPR22-03067).

Statement of Compatibility with Human Rights

The *Defence (Declared Explosive Ordnance Depots) Instrument 2022* (the 2022 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*.

The 2022 Instrument engages the following human rights:

- *the right to privacy and reputation* (article 17 of the International Covenant on Civil and Political Rights (ICCPR));
- *the right to freedom of movement* (article 12 of the ICCPR);
- *the right to just and favourable conditions of work, including safe and healthy working conditions* (article 7 of the International Covenant on Economic, Social and Cultural Rights);
- *the right to life* (article 6 of the ICCPR); and
- *the right to security of the person and freedom from arbitrary detention* (article 9 of the ICCPR).

Overview of the Legislative Instrument

For the purposes of the *Defence Act 1903* (the Defence Act), an area of land or any other place, or a building or other structure is a ‘declared explosive ordnance depot’ if it is specified in an instrument in force under subsection 71L(2) of the Defence Act and signs stating that it is a condition of entry to the area of land or the place, building or structure that a person undergo searches as provided by Subdivision B of Division 3 of Part VIA of the Defence Act are prominently displayed at its entrance and at regular intervals around its perimeter (subsection 71L(1)).

Subsection 71L(2) of the Defence Act provides that the Minister may, by legislative instrument, specify an area of land or any other place (whether or not it is enclosed or built on), or a building or other structure for the purposes of subsection 71L(1) if:

- a) the area of land or the place, building or structure is defence premises used wholly or partly for the storage of explosive ordnance; and
- b) members of the Defence Force are not normally present at the area of land or the place, building or structure.

The purpose of the 2022 Instrument is to repeal and replace the *Defence (Declared Explosive Ordnance Depots) Instrument 2012* (the 2012 Instrument), which currently specifies the areas of land, places, buildings or structures by reference to a unique code (which is held in the records of the Department) for the purposes of subsection 71L(2) of the Defence Act. In the absence of this repeal, the 2012 Instrument would sunset on 1 October 2022 in accordance with Part 4 of Chapter 3 of the *Legislation Act 2003*.

The 2022 Instrument specifies the same areas of land, places, buildings or structures by reference to a unique code (which is held in the records of the Department) that were specified in the 2012 Instrument. It does not expand the list of locations that may meet the definition of declared explosive ordnance depot.

The significance of an area of land, place, building or structure being a declared explosive ordnance depot is that contracted defence security guards have two additional consensual search powers at these locations, set out in sections 71M and 71N of the Defence Act, over and above those that apply generally at defence access control points and on defence premises under Part VIA of the Defence Act.

Sections 71M and 71N of the Defence Act permit a contracted defence security guard to *request* a person who is on a declared explosive ordnance depot, or apparently in control of a vehicle, vessel or aircraft that is on a declared explosive ordnance depot, to undergo a limited search of their person, or a search of the vehicle, vessel or aircraft (and anything in such vehicle, vessel or aircraft).

Section 71A of the Defence Act defines a limited search of a person as:

- a) a search of things in the possession of a person that may include:
 - i) requesting the person to remove their overcoat, coat or jacket and any gloves, shoes and hat; and
 - ii) an examination of any of those items that the person consents to remove; or

- b) a search of a person conducted by quickly running the hands over the person's outer garments and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

A limited search does not include requesting the person to remove all of their garments.

Human rights implications

The right to privacy and reputation and the right to freedom of movement

By specifying a location in the 2022 Instrument, any person that is in or on that location is exposed to the risk that they will be requested by a contracted defence security guard to consent to a search under sections 71M and/or 71N, where failure to consent may lead to their restraint and detention for the purposes of placing them in police custody. In the absence of the 2022 instrument, contracted defence security guards would cease to have these particular powers at the specified locations when the 2012 Instrument sunsets.

Therefore, the 2022 Instrument engages and limits the right to privacy of those persons that are required to attend declared explosives depots, whether for work related or other purposes.

The 2022 Instrument also engages and limits the right to freedom of movement within a country to the extent that persons may be deterred from entering declared explosive ordnance depots due to the risk of being requested to consent to a search and the possible consequences of refusal to comply.

However, the 2022 Instrument would only impose a minimal limitation on these rights because the risk to a person of being asked to undergo a limited search and/or permit a search of a vehicle, vessel or aircraft apparently in their control while at a declared explosive ordnance depot is a risk that they are already exposed to when seeking to pass a defence access control point at those locations as a result of the operation of Part VIA of the Defence Act.

This is because an area of land or place, building or structure can only be specified in a declaration under subsection 71L(2) if that location is 'defence premises' (see paragraph 71L(2)(a) of the Defence Act) and there are a number of powers in Part VIA of the Defence Act that apply generally in relation to defence premises. In particular, even in the absence of the 2022 Instrument:

- persons seeking to enter or exit these locations through a defence access control point are exposed to the risk that they may be requested by a contracted defence security guard to provide identification details and evidence of their authority to pass (subsection 71H(1)), undergo a limited search of their person (subsection 71H(2)) and/or permit a search of a vehicle, vessel or aircraft apparently in their control (section 71J); and
- persons in or on these locations, whether about to pass a defence access control point or not, are exposed to the risk of being subject to a non-consensual search by special defence security officials (being security

authorised members of the Defence Force and defence security screening employees) (sections 71R to 71U).

Therefore the risk to a person of being asked to undergo a limited search and/or permit a search of a vehicle, vessel or aircraft apparently in their control *after* they have passed through a defence access control point, and while still in or on a declared explosive ordnance depot constitutes a very minimal additional limitation on the right to privacy and freedom of movement within a country over and above existing arrangements.

Further, the minimal additional limitation on rights as a result of the 2022 Instrument will only affect a small section of the population, being those dealing with the ordnance or otherwise required to attend the depot (e.g. firefighters, electrical contractors etc.). Persons without authority to be at the depot would have no right to be in or on those defence premises even in the absence of the 2022 Instrument and could be restrained and detained in accordance with section 71K of the Defence Act.

Providing these additional consensual search powers for defence contracted security guards at the particular locations specified in the 2022 Instrument is considered necessary as:

- these are defence premises where inherently dangerous material including weapons, munitions and explosive ordnance are stored;
- unauthorised items taken onsite can pose significant safety risks to those working, or otherwise present, at these defence premises;
- interference with, or the unlawful removal of, dangerous items such as weapons, munitions and explosive ordnance from defence premises poses inherent risks to public safety and Australia's national security; and
- neither security authorised members of the Defence Force (by definition - see paragraph 71L(2)(b)) nor defence security screening employees are usually present at these locations to exercise the non-consensual search powers provided under Part VIA.

There are also a number of safeguards in place in relation to the exercise of the consensual search powers available under sections 71M and 71N of the Defence Act in relation to declared explosive ordnance depots. For example:

- signs stating that it is a condition of entry to the area of land or the place, building or structure that a person undergo searches as provided by Subdivision B of Division 3 of Part VIA of the Defence Act must be prominently displayed at its entrance and at regular intervals around its perimeter (subsection 71L(1));
- contracted defence security guards must satisfy the training and qualification requirements determined by the Minister (section 71B);
- contracted defence security guards must carry an identification card when performing functions or exercising powers (subsection 71E(6)), and must produce it before making a request or requirement of a person or conducting a search of a person or vehicle, and as soon as practicable after restraining and detaining a person under sections 71M and 71N (section 72B);
- it is an offence to conduct a search of a person under section 71M or a vehicle, vessel or aircraft under section 71N without consent, attracting a maximum penalty of 50 penalty units and 30 penalty units respectively (section 71Q).

Having regard to all of these matters, to the extent that specifying locations in the 2022 Instrument would impose a minimal additional limitation on the right to privacy and the right to freedom of movement within a country, that limitation is reasonable, necessary and proportionate in pursuit of the legitimate objectives of reducing safety risks for those working, or otherwise present, at these defence premises where inherently dangerous materials are stored, protecting the safety and security of the defence premises itself and protecting public safety and Australia's national security more generally.

The right to just and favourable conditions of work, including safe and healthy working conditions

As noted above, explosive ordnance depots are places at which inherently dangerous items are stored. The 2022 Instrument engages and promotes the right to just and favourable conditions of work, including safe and health working conditions, at declared explosive ordnance depots by enabling additional mechanisms by which contracted defence security guards can detect and intercept items that, when present onsite, may expose workers at declared explosive ordnance depots to additional unnecessary risks to their safety.

The right to life and the right to security of the person

The 2022 Instrument engages and promotes the right to life and right to security of the person, which require countries to take reasonable and appropriate measures to safeguard lives and protect a person's physical security.

The additional search powers for contracted defence security guards, enlivened by the 2022 Instrument, help to ensure the safety and security of the inherently dangerous material stored at explosive ordnance depots by:

- reducing the risk to the safety of persons present at the depot posed by dangerous items entering and being present at the locations; and
- reducing the risk to public safety and Australia's national security posed by the unlawful removal of weapons, munitions and explosive ordnance from defence premises.

The right to liberty and freedom from arbitrary detention

The 2022 Instrument engages the right to liberty to the extent that a contracted defence security guard is permitted, under sections 71M and 71N of the Defence Act, to restrain and detain a person for the purposes of placing them in police custody if the person is in or on a declared explosive ordnance depot and does not consent to a search when requested to do so.

However, the right to liberty of the person is not a right never to be deprived of liberty, it is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. Restraining and detaining a person in or on a declared explosive ordnance depot who refuses to submit to a consensual search, where there are very cogent safety and security reasons for permitting such searches (as described above) would

not constitute arbitrary or unlawful detention for the purposes of this right. Therefore the 2022 Instrument does not limit the right to liberty of the person.

Conclusion

The 2022 Instrument is compatible with human rights because, for the reasons outlined above, it promotes the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate in pursuit of the legitimate objectives of reducing safety risks for those working, or otherwise present, at these defence premises where inherently dangerous materials are stored, protecting the safety and security of the defence premises itself and protecting public safety and Australia's national security more generally.