REPLACEMENT EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence Personnel

Subject – Defence Act 1903

Defence (Public Areas) By-laws 2018

1. The Defence (Public Areas) By-laws 2018 (the by-laws) replace the Defence (Public Areas) By-laws 1987 (the old by-laws), which were scheduled to sunset on 1 April 2018. The by-laws are made under section 116ZD of the Defence Act 1903 (the Act).

Purpose of the Defence (Public Areas) By-laws 2018

2. The by-laws facilitate the management of public areas declared under Part IXB of the Act. There are currently two declared public areas: Beecroft Air Weapons Range in New South Wales, and Garden Island in Western Australia. Each public area is a significant tract of defence land that can be used by members of the public for a range of recreational activities, including bush walking, fishing, camping and rock climbing.

3. The by-laws establish a range of strict liability offences that apply to people within the declared public areas. This includes offences dealing with:

   a. Using vehicles otherwise than on a road or in a parking or camping area
   b. Lighting fires
   c. Bringing animals into a public area
   d. Possessing or using firearms within a public area
   e. Staying overnight in a public area that is on an island
   f. Entering a public area during a time when there are signs prohibiting entry
   g. Littering
   h. Parking otherwise than in a designated parking area
   i. Camping otherwise than in a designated camping area
   j. Contravening a direction on a sign erected under the by-laws
   k. Removing or interfering with a sign erected under the by-laws
   l. Erecting a building, booth, stall, post or other structure
   m. Supplying goods or services
   n. Damaging, destroying or removing a natural or artificial structure or feature
   o. Taking, injuring or destroying an animal or plant or the nest or dwelling of an animal.

4. These offences are substantially the same as offences that existed under the old by-laws. The only new offence is in relation to entering a public area during a time when there are signs prohibiting entry, which was added to ensure that a public area
can be appropriately closed when defence activities create safety concerns for members of the public within a public area. Each offence is subject to obtaining a written permit from an authorised officer or a ranger. The existence of these offences does not preclude the application of offences under other laws that may apply in these areas (including, for example, State-based fire bans or laws relating to firearms).

5. A new feature in the by-laws is the ability for rangers to issue infringement notices for these offences. A person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against them for contravention of an offence provision. If the person does not choose to pay the amount, proceedings can be brought against them in relation to the contravention. Through the operation of section 116ZCA of the Act, which was inserted by the Defence Legislation Amendment (Instrument Making) Act 2017, the by-laws incorporate the standard provisions in relation to infringement notices in Part 5 of the Regulatory Powers (Standard Provisions) Act 2014 (Regulatory Powers Act).

6. Another new feature in the by-laws is the appointment of authorised officers by the Chief of the Defence Force to exercise the various powers in the by-laws, in particular to approve the erection or placement of signs to convey directions, and to designate parking and camping areas. Authorised officers may also issue written permits under the by-laws. In the old by-law, these powers were vested in the relevant commanding officer (including, if there was no commanding officer, a person designated as commanding officer for the purposes of the old by-laws). An authorised officer may be an ADF member or a Defence employee, and may be appointed even if there is a commanding officer associated with the establishment. The new provision for the appointment of an authorised officer gives more flexibility, noting the trend towards civilian management of the Defence estate.

Authority for the Defence (Public Areas) By-laws 2018

7. Subsection 116ZD(1) provides that the Minister may, by legislative instrument, make by-laws for and in relation to the control and management of public areas. Without limiting that power, subsection 116ZD(2) lists matters that may be provided for in the by-laws, including:
   a. regulating or prohibiting access to public areas by persons or classes of persons;
   b. regulating or prohibiting camping, the use of fire, the carrying on of any trade or commerce, the use of vehicles, and weapons in public areas;
   c. providing for functions and powers to be conferred upon rangers;
   d. providing for the protection and preservation of public areas and property and things in public areas;
   e. regulating or prohibiting the taking of animals or plants into, or out of, public areas; and
f. providing for penalties, not exceeding a fine of 10 penalty units, for offences against the by-laws.

8. Subsection 116ZCA(1) provides that a strict liability offence against the by-laws is subject to an infringement notice under Part 5 of the Regulatory Powers Act if the by-laws specify the offence for the purposes of that subsection.

**Operation of the Defence (Public Areas) By-laws 2018**


**Legislative instrument**

10. The by-laws are a legislative instrument for the purposes of the *Legislation Act 2003*.

**Consultation**

11. Defence employees and Australian Defence Force members responsible for the management of each of the two public areas were consulted in the development of the by-laws.

12. The by-laws were drafted by the Office of Parliamentary Counsel.

**Attachment**

A: Provisions in the *Defence (Public Areas) By-laws 2018*. 
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence (Public Areas) By-laws 2018

1. This 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 instrument

2. The Defence (Public Areas) By-laws 2018 (the by-laws) replace the Defence (Public Areas) By-laws 1987 (the old by-laws), which were scheduled to sunset on 1 April 2018. The by-laws facilitate the management of public areas declared under Part IXB of the Act by establishing strict liability offences that apply to people within public areas. Infringement notices may be issued in relation to contraventions of the by-laws. The issuing of infringement notices is subject to the provisions in Part 5 of the Regulatory Powers (Standard Provisions) Act 2014 (the Regulatory Powers Act). If issued with an infringement notice, a person may choose to pay an amount as an alternative to having court proceedings against them for a contravention of the relevant provision.

3. There are currently two declared public areas: Beecroft Air Weapons Range in New South Wales, and Garden Island in Western Australia. Each public area is a significant tract of defence land that can be used by members of the public for a range of recreational activities, including bush walking, fishing, camping and rock climbing. The by-laws have no application outside of these areas.

Human rights implications

4. The by-laws engage the human right to a fair and public hearing. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The by-laws engage this right in two ways: through the establishment of various strict liability offences, and through the introduction of an infringement notice scheme in relation to those offences.

Strict liability offences

5. The application of strict liability to the offences in the by-laws means that there is no need for the prosecution to prove fault in relation to those offences, although the defence of mistake of fact is available. The purpose of the by-laws is to enable the management of the public areas, including by regulating the conduct of members of the public who enter a public area. The offences in the by-laws are directed at ensuring public safety, preserving the natural and built environment in public areas, and ensuring that defence activities may be conducted within or near public areas.
6. Noting the relatively low penalties associated with the offences, the nature of the offences, and their limited geographical application, proving the relevant mental element (recklessness in most cases) would often require time and resources disproportionate to the offence. Making these offences strict liability is reasonable, necessary and proportionate to a legitimate objective.

Infringement notice scheme

7. Under the by-laws, an infringement notice can be issued by an infringement officer (in this case, a ranger appointed under the Act), for contraventions of the various strict liability offences established in the by-laws. When issued an infringement notice, a person can choose to pay an amount (one-fifth of the maximum penalty established for the offence) rather than be subject to court proceedings for the contravention. If a person chooses not to pay, the offence may be prosecuted in a court.

8. The right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved. In accordance with the standard provisions in Part 5 of the Regulatory Powers Act, a person can elect to have the matter heard by a court rather than pay the amount specified in an infringement notice. This right must be stated in the infringement notice, ensuring that a person issued with an infringement notice is aware of their right to have the matter heard by a court.

Conclusion

9. The by-laws are compatible with human rights because, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to a legitimate objective.
ATTACHMENT A – PROVISIONS IN DEFENCE (PUBLIC AREAS) BY-LAWS 2018

Part 1 – Preliminary

Section 1 – Name

1. Section 1 provides for the instrument’s name: Defence (Public Areas) By-laws 2018.

Section 2 – Commencement

2. Section 2 provides for the Defence (Public Areas) By-laws 2018 (the by-laws) to commence on 26 March 2018. This is the same day as the commencement of the Defence Legislation Amendment (Instrument Making) Act 2017 has been proclaimed. That Act amended the Defence Act 1903 (the Act) to insert section 116ZCA, which enables the infringement notice scheme.

Section 3 – Authority

3. Section 3 provides that the by-laws are made under section 116ZD of the Act.

Section 4 – Schedules

4. Section 4 provides that each instrument specified in a schedule to the by-laws is amended or repealed as set out in the schedule. Schedule 1 provides for the repeal of the Defence (Public Areas) By-laws 1987 (the old by-laws).

Section 5 – Definitions

5. Section 5 provides for various definitions used throughout the by-laws. The note in section 5 states that a number of expressions used in the by-laws are defined in the Act, including ‘Chief of the Defence Force’ and ‘Defence Force’.

6. The following terms are defined in section 5:

   a. ‘Act’, which means the Defence Act 1903.

   b. ‘authorised officer’, which means a person appointed by the Chief of the Defence Force under section 6.

   c. ‘camping area’, which means an area that has been designated as a camping area by the erection or placement of signs at or near each entrance to the public area with the approval of an authorised officer under section 8.

   d. ‘parking area’, which means an area that has been designated as a parking area by the erection or placement of signs at or near each entrance to the public area with the approval of an authorised officer under section 8.
e. ‘public area’, which has the meaning given in subsection 116P(1) of the Act, and means a public area declared under section 116Q of the Act.

f. ‘ranger’, which has the meaning given in subsection 116P(1) of the Act, and means a person appointed under section 116S of the Act or referred to in section 116T of the Act.

Section 6 – Appointment of authorised officers

7. Section 6 provides for the appointment of authorised officers by the Chief of the Defence Force. An authorised person may be an ADF member or an APS employee in the Department, and an appointment is to be in writing (subsection 6(1)). The Chief of the Defence Force must only appoint a person to be an authorised officer if satisfied that they have suitable qualifications and experience to exercise the powers of an authorised officer in the instrument (subsection 6(2)). Those powers include: approving the erection or placement of signs giving directions, warnings or requirements or designating camping areas and parking areas; and issuing permits to engage in various activities. These are powers that will likely need to be exercised on a local level, by a person with day to day responsibility for managing a public area, and managing public expectations in relation to a public area.

8. The concept of authorised officer has replaced the concept of commanding officer used in the old by-laws.

Section 7 – Authorised officers and rangers may issue permits

9. Section 7 provides that an authorised officer or a ranger may issue written permits for the purposes of the by-laws.

Section 8 – Erecting or placing or signs

10. Section 8 provides that an authorised officer may, by instrument in writing, approve the erecting or placing of signs at or near an entrance to a public area or a part of a public area. Signs may be for the purpose of:

   a. conveying directions to be followed by persons using a public area (paragraph 8(a)(i));
   b. conveying warnings for the guidance of persons using a public area (paragraph 8(a)(ii));
   c. conveying requirements to be observed by persons using a public area (paragraph 8(1)(iii));
   d. designating part of a public area as a parking area; or
   e. designating part of a public area, other than a public area that is on an island, as a camping area.
11. Camping areas are not designated on public areas that are on an island because entry is not permitted at night (see section 14). This is relevant for the Garden Island public area, which is only accessible to the public during the day.

12. This section is the same in substance as rule 4 in the old by-laws.

**Section 9 – Concurrent operation of Part 11 of the Defence Regulation 2016**

13. Section 9 confirms that the by-laws do not exclude or limit the operation of Part 11 of the Defence Regulation 2016, which regulates the use of areas declared to be defence areas for use for defence purposes. There is nothing to prevent part of a declared public area also being declared under Part 11 of the Defence Regulation 2016 as a defence area. If that occurs, the provisions of the Defence Regulation 2016 and the by-laws will apply simultaneously.

**Part 2 – Offences**

14. This part outlines the strict liability offences that apply in public areas. The existence of these offences does not preclude the operation of offence provisions in other laws, including the operation of State and Territory based offences that may apply because of the Commonwealth Places (Application of Laws) Act 1970.

15. The maximum penalty for each offence is 10 penalty units (a penalty unit is currently $210). If the offence is enforced by issuing an infringement notice, the amount payable in accordance with the infringement notice is 2 penalty units (one fifth of the maximum penalty), in accordance with paragraph 104(2)(a) of the Regulatory Powers Act. The maximum penalty in each case has been increased from 5 penalty units, which applied to the corresponding offences in the old by-laws. The amount payable under an infringement notices is only one fifth of the maximum penalty, and a payment of 2 penalty units was considered a more realistic disincentive for committing this offence (one penalty unit is currently $210).

16. Each of the provisions provides that the offence does not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct. This imposes an evidential burden of proof on a person wishing to rely on this exception, which requires them to adduce or point to evidence that the written permit exists. Once they have done this, the prosecution would need to disprove the existence of a written permit in order to prove the offence. This amounts to a reversal of the burden of proof in relation to the written permit.

17. The existence of a specific written permit could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of such a permit beyond reasonable doubt as a matter of course. In the case of a ranger issuing an infringement notice for a contravention of an offence provision, this would require a reasonable belief that
there was no written permit, which would be difficult for a ranger in the field to establish without having access to information of all written permits issued by all rangers and authorised officers. This would not be feasible in many cases. The penalties for these offences are relatively low (especially when enforced by way of an infringement notice), and reversal of the burden of proof in relation to the existence of a written permit is reasonable in order to ensure the effectiveness of these provisions.

Section 10 – Offences relating to vehicles

18. Section 10 provides for a strict liability offence if a person brings or uses a vehicle in a public area that is on an island (paragraph 10(1)(a)). This offence is relevant in the Garden Island public area, which is on an island. It also provides a strict liability offence if a person uses a vehicle in a public area that is not an island, otherwise than on a road or in a parking area or camping area (paragraph 10(1)(b)). This offence is relevant in the Beecroft public area. These offences help preserve the environment in the public areas, as well as contributing to safety.

19. The offences do not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct (subsection 10(2)).

20. These offences are substantially the same as the offences in rule 6 of the old by-laws, apart from the increase in penalty from 5 penalty units to 10 penalty units.

Section 11 – Offences relating to lighting etc. of fires

21. Section 11 provides for a strict liability offence if, in a public area, a person lights, maintains or uses a fire, and the fire is not in a portable barbecue or portable stove that uses liquefied petroleum gas, or in a fireplace made available by the Commonwealth for use by persons in the public area (subsection 11(1)). This offence helps preserve the environment in public areas, as well as contributing to safety. The existence of this offence does not preclude the operation of fire restrictions that might otherwise apply at any given time.

22. The offence does not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct (subsection 11(2)). If a person lights, maintains or uses a fire in response to circumstances of sudden or extraordinary emergency, it will not constitute an offence (item 10.3 of the Criminal Code).

23. This offence is substantially the same as the offence in rule 7 of the old by-laws, apart from the increase in penalty from 5 penalty units to 10 penalty units.

Section 12 – Offence to take animals into public area

24. Section 12 provides for a strict liability offence if a person takes an animal into a public area or permits an animal that is not wildlife to enter a public area (subsection
12(1)). The offence does not apply to assistance animals (subsection 12(2)). This offence helps preserve the environment in public areas.

25. The offence does not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct (subsection 12(3)).

26. This offence is substantially the same as the offence in rule 8 of the old by-laws, apart from the increase in penalty from 5 penalty units to 10 penalty units.

Section 13 – Offence relating to firearms in public area

27. Section 13 provides for a strict liability offence if a person possesses or uses a firearm in a public area (subsection 13(1)). The existence of this offence does not preclude the operation of other firearms laws.

28. The offence does not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct (subsection 13(2)).

29. This offence is substantially the same as the offence in rule 9 of the old by-laws, apart from the increase in penalty from 5 penalty units to 10 penalty units.

Section 14 – Offence to enter or stay in public area that is on island

30. Section 14 provides for a strict liability offence if a person enters or stays in a public area that is on an island between sunset and sunrise (subsection 14(1)). This offence is relevant in the Garden Island public area, which is not accessible to the public at night.

31. This offence does not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct (subsection 14(2)).

32. This offence is substantially the same as the offence in rule 10 of the old by-laws, apart from the increase in penalty from 5 penalty units to 10 penalty units.

Section 15 – Offence to enter into public area if signs prohibit entry

33. Section 15 provides for an authorised officer to arrange for signs to be erected or placed prohibiting entry into a public area (subsection 15(1)). The authorised officer must be reasonably satisfied that it is necessary having regard to: the need to protect persons and property that might be affected by activities in the public area (paragraph 15(1)(a)); the nature of the activities to be undertaken in the area (paragraph 15(1)(b)); and the equipment to be used in those activities, and the risk to persons or property that is likely to arise from that use (paragraph 15(1)(c)). For example, the authorised officer at Beecroft Weapons Range public area may decide to close the
public area while the weapons range is being used for live fire exercises, in order to ensure public safety.

34. It is a strict liability offence for a person to be in a public area while entry is prohibited by a sign erected or placed under this section (subsection 15(2)).

35. The offence does not apply if the person has a written permit from an authorised officer for the relevant conduct (subsection 15(3)).

36. This is a new offence, and was included to make absolutely clear that a public area can be closed in order to facilitate the safe conduct of defence operations and exercises.

**Section 16 – Offence to undertake particular activities without permit from authorised officer or ranger**

37. Section 16 provides for a strict liability offence if a person does any of a range of activities (subsection 16(1)). The prohibited conduct is:
   a. leaving rubbish or litter in place that is not a receptacle made available by the Commonwealth for that purpose (paragraph 16(1)(a));
   b. parking a vehicle outside a parking area (paragraph 16(1)(b));
   c. camping outside a camping area (paragraph 16(1)(c));
   d. contravening a direction, warning or requirement on a sign erected or placed with the approval of an authorised officer under section 8 (paragraph 16(1)(d));
   e. removing or interfering with a sign erected or placed under section 8 or section 15 (paragraph 16(1)(e));
   f. erecting or placing a sign otherwise than in accordance with section 8 or section 15 (paragraph 16(1)(f));
   g. erecting a building, booth, stall, post or other structure (paragraph 16(1)(g));
   h. Supplying goods or services (paragraph 16(1)(h));
   i. engaging in conduct that damages, destroys or removes a natural or artificial structure or feature (paragraph 16(1)(i)); or
   j. taking, or engaging in conduct that damages, injures or destroys an animal or plant or the nest or dwelling of an animal (paragraph 16(1)(j)).

38. The offence does not apply if the person has a written permit from an authorised officer or a ranger for the relevant conduct (subsection 16(2)).

39. This offence is substantially the same as the offences in rules 11 and 12 of the old by-laws, apart from the increase in penalty from 5 penalty units to 10 penalty units.
Section 17 – Offences that are subject to infringement notices

40. This section specifies offences for the purposes of subsection 116ZCA(1) of the Act, which applies the infringement notice scheme in Part 5 of the Regulatory Powers Act to specified offences. All of the offences in the by-laws are listed.

41. Part 5 of the Regulatory Powers Act creates a framework for the use of infringement notices where an infringement officer (in this case a ranger) reasonably believes that a provision has been contravened. An infringement notice must include (section 104 of Regulatory Powers Act):

a. a unique identifying number;

b. the day on which the notice is given;

c. the name of the person to whom the notice is given;

d. the name and contact details of the person who gave the notice, and that the person is an infringement officer for the purposes of issuing the infringement notice;

e. brief details of the contravention, including the provision that was allegedly contravened, the maximum penalty that a court could impose, and the time and day and place of the alleged contravention;

f. the amount payable under the notice;

g. an explanation of how payment is to be made;

h. a statement that if the person pays the amount within 28 days after the notice is given, then the person will not be liable to prosecuted in a court for the alleged contravention;

i. a statement that payment of the amount is not an admission of guilt;

j. a statement that the person may apply to the relevant chief executive (in this case the Secretary of Chief of the Defence Force) to have the period to pay the amount extended;

k. a statement that the person may choose not to pay the amount and, if the person does so, that the person may be prosecuted in a court for the alleged contravention;

l. how the notice can be withdrawn;

m. a statement that if the notice is withdrawn, the person may be prosecuted in a court for the alleged contravention; and

n. a statement that the person may make written representations to the relevant chief executive seeking withdrawal of the notice.

Section 18 – Rangers, Defence Force members and police performing duties do not commit offence

42. Section 18 provides that a person who is a ranger, a member of the Defence Force, a member of the Australian Federal Police, or a member of the police force of a State or Territory, does not commit an offence against the by-laws if the act that would give rise to an offence occurs in the performance of their duties (subsection 18(1)).
43. This provision is substantially the same as rule 5 in the old by-laws.

Part 3 – Transitional provisions

44. This part includes several provisions to assist in the transition from the old by-laws. Actions taken under the old by-laws, including in relation to the erection and placement of signs and giving consent for certain activities, will have effect as if they were done under the by-laws.

Section 19 – Definitions

45. This section defines ‘old instrument’ as meaning the Defence (Public Areas) By-laws 1987, as in force immediately before the commencement of the section.

Section 20 – Authorised officers

46. Section 20 provides for any designation of a person as a commanding officer under rule 3 of the old by-laws, in force immediately before commencement, to have effect as if it were an appointment of the person as an authorised officer under section 6 of the by-laws.

Section 21 – Approvals to erect or place signs

47. Section 21 provides that an approval given under rule 4 of the old by-laws, in force immediately before commencement, has effect as if it were an approval given under section 8 of the by-laws. This means that an approval to erect or place a sign under the old by-laws can be treated as an approval to erect or place a sign under the by-laws.

Section 22 – Signs

48. Section 22 provides that a sign erected or placed under the old by-laws is taken to have been erected or placed under the by-laws. This means there is no need to replace all the signs throughout the public areas that were erected under the old by-laws.

Section 23 – Consents

49. Section 23 provides that a consent issued by a commanding officer or a ranger under the old by-laws has effect as if it were a permit issued by an authorised officer or ranger under the by-laws. This means there is no need to re-issue permits to conduct activities when the by-laws commence.

Schedule 1 – Repeals

Item 1

50. This item repeals the whole of the Defence (Public Areas) By-laws 1987, which have been replaced by this instrument and would have sunset on 1 April 2018 in any case.