



# DEFENCE FORCE WELFARE ASSOCIATION

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*Patron:* His Excellency Major General Michael Jeffery AC CVO MC (Retd)  
Governor-General of the Commonwealth of Australia

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The LIA Review Secretariat  
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### **Defence Force Welfare Association (DFWA) Submission –**

#### ***Review of the Legislative Instruments Act 2003***

Our Association thanks the Review Committee for its invitation to provide a submission to the current review.

While DFWA agrees there is probably a need to define legislative instruments more precisely (Questions 1-3), our experience has been in responding to consultation requests from relevant Commonwealth authorities – ComCare, Department of Veterans' Affairs, etc. In those cases, particularly given the invariably short time scales allowed for consultation, it has been sufficient merely for DFWA to seek confirmation from the rule-makers whether the instrument is a legislative instrument, if that was not already mentioned in the covering letter seeking comments.

#### **Consultation**

With respect to the general issue of consultation (Questions 4-7), the following recent example is relevant.

The *Defence Force Amendment Regulations (No. 1) 2008* (F2008I01192) were registered on the FRLI last Friday (2 May). They deal with Redress of Grievance procedures under the new Defence discipline code. The second page of the Explanatory Statement says: "There has been no consultation in the making of this instrument as it relates to the management of and the service of members of the Australian Defence Force."

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That exemption from consultation is, in fact, specifically allowed at 18(2)(g) of the *Legislative Instruments Act 2003* but we believe that it is unnecessarily broad. DFWA is represented before the Defence Force Remuneration Tribunal, which sets ADF salaries, and there are a number of other areas relating to “the management of and the service of members of the Australian Defence Force” to which DFWA contributes. What harm might consultation have done in this instance?

We do not see any untoward intent in this example of an exemption under the Act. Instead, we offer it to the Review Committee as an example of how the 2003 Act, which was drafted in an atmosphere of misgiving by many rule-makers, now allows rule-makers to make arbitrary decisions without regard to the possible *benefits* of consultation about legislative instruments.

Other than where there is a justifiable need for secrecy or urgency, providing opportunity for wide consultation would normally offer benefits for both the Government and for the rule-makers. At the very least, wide consultation may identify ambiguities or a lack of clarity in the drafting of the instrument and, if consultation exposed policy issues or unintended consequences, it would be best if the Government was aware of those from the outset. It should also be borne in mind that there is no requirement for the Government to *change* an instrument as a result of consultations.

It is therefore recommended that Section 18 of the Act should be reviewed to reduce the exemptions from consultation. In any case, quite how and with whom rule-makers should consult if they, personally, cannot be sure who might be interested in the instrument is a mystery not addressed in the current Act. Instead of relying on consultation only with cabals of insiders who happen to be known to the rule-makers, consultation should be made open and transparent to anyone who has an interest in the subject.

With regard to **Regulatory Impact Statements** (Question 6), DFWA does not believe that all of the rule-makers responsible for drafting legislative instruments can always be fully aware of all the implications of their proposed instruments. It is therefore difficult to see how those rule-makers can be expected to draft thorough and comprehensive Regulatory Impact Statements until *after* they have taken the opportunity to engage in the broadest possible consultations.

**DFWA recommends that the Review Committee examine the feasibility of have a secondary public register, somewhat similar to the FRLI, where most *proposed* legislative instruments would need to be posted for a mandatory consultation period, of at least 7 and ideally 28 days.**

As indicated above, there would be other instruments which, because of their security, taxation or other regulatory sensitivity, it would be impracticable to publish in advance in order to consult. In those cases where consultation in advance is impracticable, it may be worth considering whether comments should not be invited *after the fact*, perhaps with a mandatory paragraph in the Explanatory Statements immediately after the paragraph which explains why no prior consultation was undertaken. Such a procedure would, at least, ensure that the rule-makers quickly became aware of, and had the opportunity to respond to, any “unintended consequences” or drafting errors.

DFWA also believes that, by encouraging wider preliminary consultation, the **quality of the drafting** of the instruments (Questions 8-9) would be considerably improved.

As indicated by the example above, there may be inadequate thought given during the **drafting of some Explanatory Statements** (Question 10). Again, better consultation may overcome some of the problems but DFWA also recommends that the Review Committee examines the very purpose of modern Explanatory Statements.

Until about 1992, Explanatory Statements were drafted primarily to assure the Governor-General, in Executive Council, that he had the power under the Constitution and the relevant Act to make the regulations that were being recommended to him by his Government. As with the increased use made from about 1975 of Explanatory Memoranda that accompany Bills, Explanatory Statements are now increasingly seen to be formal, comprehensible explanations of the intent and workings of often arcane legislative instruments, so drafting instructions are required. It is also for consideration by the Review Committee that Explanatory Statements' legal interpretive status as extrinsic evidence may need to be clarified, just as the status of Explanatory Memoranda for Bills was clarified in the 1984 amendments to s.15AB of the *Acts Interpretation Act 1901*.

### **Other Matters**

DFWA has no comments on Question 11 (**documents incorporated by reference**).

DFWA itself does monitor the FRLI on a day-to-day basis, so we have no comments on Questions 12-16, but we do believe that the FRLI has been effective in improving **public access to legislative instruments** to such an extent that FRLI's relatively minor inadequacies have been highlighted (Question 17).

We have no comments on Questions 18-20, except to recommend that any **changes to the FRLI system** should be very carefully handled and should be incremental and organic, rather than a complete re-vamp.

Question 21 deals with the current court-derived rejection of **retrospective commencement** of most legislation, except where it can be demonstrated that the effect is beneficial to all. DFWA believes that prohibition must continue (see next paragraph). The principle is fundamental to the Rule of Law and a safeguard against oppression.

No instrument with sections that contravene the restrictions on retrospective commencement should be allowed to remain **valid prospectively** (Question 22). For it to contain such a defect demonstrates that the instrument was inadequately drafted, or badly handled in its registration, or worse. It is legally invalid, and warrants careful re-evaluation before it might possibly be completely re-made.

It would be very hard in practice to establish a **mandatory minimum period** between the registering of all instruments and their commencement (Question 23), although it may be tempting. Some instruments – security, taxation, etc - must come into force immediately.

With regard to Question 24 – giving **better notice of instruments coming into effect** – see our comments above regarding the publication of “normal” instruments on a public register for their consultation period, which should meet this objective for most instruments.

DFWA is not in a position to comment on Questions 25-46

Thank you for your consideration.

Richard Griffiths  
National Secretary