VICTIMS OF ABUSE IN THE AUSTRALIAN DEFENCE FORCE ASSOCIATION INC.
A0059257W

Submission

To

Senate Committee Inquiry Model Litigant Law Amendment

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ABSTRACT

[The current bill before the Senate is a poorly conceived bill and should be rejected.

1. It undermines the authority of the Attorney General.
2. It actually encourages the Commonwealth to ignore the decisions of the Courts to act as a model litigant.
3. Provides no effective relief to the failure of the Commonwealth to act as model litigant.]

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The Voice For The Voiceless

The Australian Defence Force And Abuse:-

"It was Hubris that made Angels into Devils.

It is obstinacy that keeps them in Hell"

1.0 Management Summary

1.1 The Experience Of Our Members

The experience of our members is through suing Defence for the abuse they suffered as children in the Australian Defence Force .

That experience has included:-

1. Defence denying liability when reports such as Rapke Report in Defence's possession shows otherwise.

   In one case the full un redacted report was sought by way of discovery.

   Defence attempted to resist production on grounds normally of relevance to Freedom Of Information – that the release was not in the public interest.

   It was only when the Judge gave Defence the stark choice of:-

   a. Produce the report or

   b. Admit liability

   That Defence admitted liability.

2. In mediation

   a. Undertakings being made on behalf of the Department Of Veterans Affairs which were clearly wrong

   b. Deliberate misinformation about conversion to a medical discharge via Regulation 99 or 26 as to:-

      i. How easy it was – its not

      ii. Its impact on claiming with the Department Of Veterans Affairs

         1. Under Regulation 26 it has no impact and

         2. In any event for most litigation, upon successful conclusion you are locked out of benefits from the Department Of Veterans Affairs except for non liability mental health care.

      iii. Its impact with obtaining benefits from Defence Death Benefits Retirement Fund or Military Superannuation.

The lawyers for our members were unable to deal with the breach of the model litigant rules.

The way we were able to successfully deal with the matter was by raising our concerns direct with the Attorney General and Minister for Defence Personnel.

1.2 Why The Legislation Should Be Rejected

1. The Attorney General, through the Model Litigant Rules is giving an order – not a suggestion. It undermines the Attorney General's Authority.
2. It ignores the requirement for the Commonwealth to obey the decisions of the Full Bench of the Federal Court and High Court
3. It is based upon a false assumption – that all litigation proceeds to final orders.

   It in effect, means the Commonwealth can ignore the rules where the matter does not proceed to final decision in Court i.e. is "resolved" by mediation.
4. The Commonwealth Ombudsman lakes the expertise in the field.
5. The remedy itself is of little utility.

2.0 Undermines The Attorney General's Authority

The Attorney General, through the Model Litigant Rules is giving an order – not a suggestion.

Commonwealth Departments and Commonwealth Entities are bound by them.

This legislation in effect says the Attorney General is incapable of enforcing his own orders.

Our experience says the Attorney General can and does enforce them.

Whereas the alternative proposed by this legislation is of far lesser utility.

1. Litigant suspends proceedings – this increasing the delay in resolving matter and increasing stress, quite often financial distress.
2. Commonwealth Ombudsman investigates and makes report to Court.
3. Which at best would provide indemnity costs as relief which is of little utility when consideration to the real total cost of Commonwealth not following the Model Litigant Rules.

Better the responsibility of enforcing the Model Litigant Rules be done by the Attorney General.

This does not undermine the Attorney General's Authority.

Furthermore, by rejecting this legislation, it does not allow the Attorney General to abrogate their responsibilities.

3.0 Ignores The Commonwealth's Obligation To Obey Decisions Of The Courts

It ignores the requirement for the Commonwealth to obey the decisions of the Full Bench of the Federal Court and High Court

Decisions of the High Court and Federal Court (Full bench) are binding decisions.

An example of this is the Whiteman Decision – See **Paul Raymond Whiteman v Secretary, Department of Veterans Affairs** [1996] FCA 1786 (17 September 1996).

This is a decision that was ultimately confirmed by the Full Bench of the Federal Court which affects the Department Of Veterans Affairs and how it makes decisions.

The Department Of Veterans Affairs regularly uses this decision as the justification to grant benefits to Veterans who have less than three years service under the Veterans Entitlement Act.

They are not a smorgasbord where you can take what you like and leave the rest.

Given the decisions of the Courts, it is up to the Federal Government and Parliament to ensure that the Commonwealth follows the decision at all times – not handball to the Commonwealth Ombudsman to determine if it has broken the rules.

It must be proactive and not just leave it up to the Courts and the Commonwealth Ombudsman, especially when the current remedies are insufficient as will be seen.

4.0 Current Proposed Legislation Based Upon False Assumptions - Of No Utility With Mediations

This legislation is based upon a false assumption – that all litigation proceeds to Final Orders.

They do not!

There is always a lot of pressure on an Applicant to settle:-

1. To get the matter over and done with
2. To get some money in the door.
3. To stop the ongoing stress of the litigation.
4. To stop having to go up against the full resources of the Commonwealth
5. To avoid having indemnity costs awarded against them should they receive less at Court than at mediation.

Under the proposed Legislation, the Commonwealth Ombudsman has no role here.

I am mindful of story told me once by a Victorian Work Cover Commissioner.

He had before him for certification a consent agreement for a Work Cover Claim where the worker was accepting $20,000 for a Claim the Commissioner worked out should have been about $70,000 - $80,000.

When he asked the worker why he was settling for $20,000, he said:-

1. It had dragged out for two years
2. It had destroyed his marriage
3. He just wanted to move on.

Needless to say under the no disadvantage test, the Commissioner rejected the consent agreement.

Ultimately the worker got what his injuries rated.

Thus it is clear that the proposed legislation does not address the situation where:-

1. The Commonwealth does not act as a Model Litigant and
2. The matter is resolved by mediation.

This has been the experience of our members and their lawyers.

5.0 Commonwealth Ombudsman Lacks The Necessary Expertise

The Commonwealth Ombudsman lacks the expertise in the field.

The Commonwealth Ombudsman specialises in the law of Procedural Fairness, Perception of Bias and Natural Justice.

It has no expertise in Commercial or Personal Injury Litigation.

Thus it is not qualified to pass comment on whether the Commonwealth has behaved as a model litigant or not.

6.0 The "Remedy" Is No Remedy At All – Does Not Ensure Compliance With The Model Litigant Rules.

The "remedy" seeks to make a report to Court as if this will resolve the matter.

It will not.

The Court will award relief based upon:-
1. The Claims made
2. The objective facts of the case.

At best such a report may get you indemnity costs - but not at mediation.

But this is the money of the Commonwealth and not the individuals of the Commonwealth who chose to disobey the model litigant rules.

Until we introduce legislation to hold them personally accountable with significant penalties for both Department and the individuals, the abuse will continue.

This "remedy" of the proposed legislation is no remedy at all.

7.0 Conclusion

The defects of the proposed legislation cannot be fixed by amendment.

The Proposed Legislation should be rejected by the Senate.