

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017



Australian Government

Department of Defence

SUBMISSION OF THE DEPARTMENT OF DEFENCE

**SENATE COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE**

*Inquiry into the Judiciary Amendment (Commonwealth Model Litigant
Obligations) Bill 2017*

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Introduction

1. On 7 December 2017, the Senate referred the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (the Bill) to the Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report by 8 May 2018. The deadline for submissions to the inquiry was 28 February 2018.
2. On 18 April 2018, the Committee wrote to the Department of Defence (Defence), advising that the Committee has accepted and published a submission from Ms Mona Krombholz (submission number 13), in which she made a number of allegations against Defence. The Committee invited Defence to respond to the submission from Ms Krombholz, if it wished to do so.
3. The purpose of this submission is twofold. The first part of the submission provides general comments on the Bill, and the second part of the submission responds more specifically to the issues raised by Ms Krombholz in her submission.

Model Litigant Obligations

4. Defence has had the benefit of reading submissions from other agencies, including the Department of Human Services, the Australian Taxation Office, the Office of Commonwealth Ombudsman, the Attorney-General's Department and the Home Affairs Portfolio. Although Defence may not have a comparable volume of litigation, Defence supports the submissions from those agencies, and in particular, wishes to make the following observations:
 - a. Defence takes the model litigant obligations as set out in the *Legal Services Directions 2017* very seriously. Conducting litigation as a 'model litigant' is not only a mandatory requirement, but it is also consistent with Defence's general approach to dispute resolution.
 - b. It has long been recognised that the model litigant obligations are not intended to oblige the Commonwealth to 'fight with one hand behind its back'. The model litigant obligations themselves note that the Commonwealth and its agencies are not prevented from acting firmly and properly to protect their interests, taking all legitimate steps to pursue claims or to test or defend claims against them, or pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute.
 - c. The current arrangement whereby the Office of Legal Services Coordination in the Attorney-General's Department monitor and assist agencies with compliance has worked well. There has been no evidence to suggest that having enforceable model litigant obligations is necessary or justified.
 - d. The Bill has the potential to cause delays by creating a distraction which would complicate proceedings, increase litigation costs for the Commonwealth and the litigant, and also contribute to an already significant workload for the courts, tribunals and the Commonwealth Ombudsman. The concept of the model litigant is meant to be flexible and principle-based, allowing it to be adapted to the circumstances of a particular matter. The overly technical

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approach adopted by the Bill may lead parties to focus on technical requirements, rather than dealing with the substantive issue of the litigation.

Ms Krombholz

5. Defence strongly rejects the allegations made by Ms Krombholz against the Commonwealth in her submission to the Committee. Defence does not intend to engage with Ms Krombholz during the conduct of this inquiry, as it is not the appropriate forum to discuss individual matters.
6. The Commonwealth has acted appropriately at all times throughout the conduct of the Fair Work Commission and Federal Court of Australia proceedings. As far as Defence is aware, Ms Krombholz has not made any complaint of breaches of model litigant obligations to the Office of Legal Services Coordination, or the Commonwealth Ombudsman. In addition, neither the Fair Work Commission nor the Federal Court made any adverse comments on the Commonwealth's conduct of the proceedings.
7. The underlying issues of complaints by Ms Krombholz alleging fraud, corruption and abuse of public office were investigated by Defence's Fraud Control and Investigation Branch. Most of the allegations were found to be unsubstantiated. There were breaches of policy in relation to disclosure and management of conflicts of interest and travel allowances, but such breaches were not directly related to the management of Ms Krombholz. These breaches were also not related to the Commonwealth's model litigant obligation, which is the focus of the current Commonwealth inquiry, and were dealt with appropriately in accordance with departmental procedures. A redacted copy of the investigation report is available on Defence's Freedom of Information Disclosure Log.