



Submission by the
Commonwealth Ombudsman

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

Submission by the Commonwealth Ombudsman, Michael Manthorpe

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Background

The purpose of the Office of the Commonwealth Ombudsman is to:

- Provide assurance that the organisations we oversight act with integrity and treat people fairly
- Influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Response to Provisions of the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

Introduction

The Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (the Bill) would amend the *Judiciary Act 1903* to:

- require the Attorney-General to issue directions applying generally to Commonwealth legal work that contain requirements for Commonwealth litigants to act as model litigants (model litigant obligations)
- enable a court to order a stay of proceedings on the basis of, or make orders in relation to, contraventions of model litigant obligations

The Bill would also amend the *Ombudsman Act 1976* to:

- require the Commonwealth Ombudsman to consider complaints in relation to contraventions of model litigant obligations; and,
- require the Commonwealth Ombudsman to report annually on:
 - a. complaints made to my Office regarding compliance with the model litigant obligations
 - b. action taken by my Office, Departments and prescribed authorities in relation to the complaints.

The Bill seeks to enact recommendation 12.3 of the Productivity Commission's *Inquiry into Access to Justice Arrangements*¹ and create an enforcement process in relation to the Commonwealth's model litigant obligation.

This submission does not seek to comment on the desirability of such policy outcomes, that is a matter for Parliament. Instead, this submission raises issues for the Committee's consideration that arise for this Office under the scheme proposed by the Bill. Those issues include:

- the interaction between the scheme proposed in the Bill and current common law jurisdiction and remedies
- the current functions of the Commonwealth Ombudsman, and
- the necessary expertise and resourcing to perform the function.

The interaction between the scheme proposed in the Bill and current common law jurisdiction and remedies

There are currently the following two sources which establish a Model Litigant Obligation which applies to the conduct of litigation by the Commonwealth:

- i. Administrative model litigant obligation, and
- ii. Common law model litigant obligation

The administrative model litigant obligation is established by the *Legal Services Directions 2017* (the Directions). The Directions establish the obligation for the Commonwealth and its agencies to act as model litigants in the conduct of litigation and acknowledge that the Attorney-General has responsibility for the maintenance of proper standards in Commonwealth litigation.²

The Courts have also decided that the Commonwealth has a duty to act as a model litigant.³ The exact content of the common law obligation is the subject of academic debate.⁴ However, the federal court decision of *ASIC v Rich* (2009) 236 FLR 1, held that the model litigant obligation contained in the Directions can be referred to as an aid to understanding the content of the common law duty.

There is, as a result, a significant overlap between the administrative and common law model litigant obligation.

¹ Productivity Commission, *Inquiry Report: Access to Justice Arrangements*, No. 72, 5 September 2014.

² See also: *Kenny v South Australia*(1987) 46 SASR 268, 273.

³ See: *Scott v Handley* (1999) 58 ALD 373; *Australian Securities Investments Commission v Hellicar* (2012) 247 CLR 345 (noting that the High Court did not decide the question of the nature of the duty); *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 196.

⁴ See: Gabrielle Appleby, "The Government as Litigant", *UNSW Law Journal*, Vol 37(1), 96.

Courts have also shown a willingness to enforce a perceived breach of the common law model litigant obligation through:

- Interlocutory or procedural matters (i.e a stay of proceedings, discovery orders)⁵
- Consideration of costs orders⁶

The proposed amendment to section 55ZGA of the *Judiciary Act 1903* includes a power for the court in which the proceedings are being heard to stay the proceedings while my Office investigates a complaint that a Commonwealth litigant has contravened, or is likely to contravene, the model litigant obligation. Accordingly, the proposed mechanism could remove the question of a breach of the model litigant obligation from the Courts to my Office.

In considering and investigating such a complaint, my Office would not have the ability to enforce the obligation, as I am not a judicial authority. Any enforcement of the obligation could only be undertaken by the Court before which the matter is being heard. The ramification is that the Bill may operate to remove a litigant's recourse to enforce the obligation through court processes and replace it with an administrative complaint process conducted by my Office.

Alternatively, if the Bill does not operate to remove a litigant's recourse to enforcement through the Court, there is a very real possibility that in investigating a perceived breach of the model litigant obligation, my Office comes to a different view to the Courts. This is because the application of the model litigant obligation to individual instances of litigation is, in many cases, complex and the obligation, by its very nature, often pulls in different directions. As Associate Professor Gabrielle Appleby explains:

The Commonwealth has an obligation to treat individuals in litigation fairly but also to pursue its interests (as the interests of a democratically elected government) and defend the public monies in its custody. Commonwealth agencies may take legitimate steps to test and defend claims made against them and to pursue litigation to clarify points of law even where the other party wishes to settle⁷

It is complaints that raise perceived breaches on the edge of competing obligations where the possibility of different conclusions is the greatest. In such circumstances litigants will be obliged to adhere to any orders made by the court and it is unclear what status the investigation by my office would have.

The current functions of the Commonwealth Ombudsman

My office currently has the jurisdiction to consider complaints about perceived breaches of the model litigant obligations by Commonwealth agencies under section 5 of the

⁵ See: *Scott v Handley* (1999) 58 ALD 373

⁶ See: *Galea v Commonwealth of Australia (No. 2)* [2008] NSWSC 260, [20]-[21]. Which is discussed in Eugene Wheelahan, 'Model Litigant Obligations: What are They and How are They Enforced?' (Speech delivered at the Federal Court Ethics Seminar Series, Melbourne, 15 March 2016):

In one of the Melbourne Voyager cases, the NSW Supreme Court made adverse costs orders against the Commonwealth because of its delay in seeking to cross-examine the author of an expert report tendered by the plaintiff. It also criticised its approach to applications for extension of limitation periods in claims by former HMAS Melbourne personnel noting that, after 30 applications to the court, only 3 were successfully resisted. It referred to the common law model litigant obligation...

⁷ Gabrielle Appleby, "The Government as Litigant", *UNSW Law Journal*, Vol 37(1), 111.

Ombudsman Act 1976 as the directions are an administrative instrument and adherence is a matter of administration falling within the functions of my office.

My jurisdiction does not extend to considering the actions of private legal representatives as proposed in the Bill, however private legal representatives act on the instructions of the Commonwealth agency and adherence to the model litigation obligation applies to all litigation undertaken by an agency regardless of representation. Arguably, the proposed expansion of my functions to include private legal representatives is unnecessary, as private legal representatives act on instructions from Commonwealth agencies, who are already within jurisdiction.

Additionally, legal representatives are already subject to significant regulation through professional obligations, duties and privileges⁸ which are enforced by the Courts and professional bodies in each of the Australian states and territories.

It is not clear in the Bill how the proposed scheme will interact with the functions of my Office and my discretion to investigate. Section 6(2) of the *Ombudsman Act 1979* provides (emphasis in bold):

*Where a complainant has exercised, or exercises, a right to cause action to which his or her complaint relates to be reviewed by a court or by a tribunal constituted by or under an enactment, **the Ombudsman shall not investigate, or continue to investigate**, as the case may be, the action unless the Ombudsman is of the opinion that there are special reasons justifying the investigation of the action or the investigation of the action further.*

Section 6(3) of the *Ombudsman Act 1979* provides:

Where the Ombudsman is of the opinion that a complainant has or had a right to cause the action to which the complaint relates to be reviewed by a court or by a tribunal constituted by or under an enactment but has not exercised that right, the Ombudsman may decide not to investigate the action or not to investigate the action further, as the case may be, if he or she is of the opinion that, in all the circumstances, it would be reasonable for the complainant to exercise, or would have been reasonable for the complainant to have exercised, that right.

These provisions recognise the expertise and capacity of a Court to manage, resolve and enforce matters that fall within its jurisdiction (including the common law model litigant obligation). Additionally, the mandatory nature of the requirement in section 6(2) not to investigate (except where there are special reasons) avoids the duplication of oversight (or review) by my Office and a Court of an action taken by an agency, as raised above.

The necessary expertise and resourcing to perform the function

As outlined above, the application of the model litigation obligation is complex and the content of the obligation often pulls in opposing directions. Adding to this complexity is that the obligation responds to the circumstances of the matter being litigated.

As a result, an investigation by my office will necessarily include examination of the nature of the matter being litigated and a consideration of the reasons for individual decisions within litigation, as well as considering the overarching purpose of the relevant litigation.

⁸ These obligations and duties are for the most part articulated in the Australian Solicitor Conduct Rules (Law Council of Australia, *Australian Solicitor Conduct Rules* (2015). Available online at: https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf

In order to effectively perform the function as proposed, I will need to build the skills of my office to respond to this complexity and engage specially trained investigation officers who understand litigation so that the decisions made in the litigation, which are often made in a very short time frame, can be appropriately assessed and understood in context. My Office will need to be resourced appropriately in order to do so. My Office has had some limited experience in investigating claims that an agency has breached their obligations as a model litigant after a matter is completed (i.e. no longer before the Courts), which informs the view of the specialist skills that would be required to carry out the function proposed for my Office in the Bill.

Additionally, the Bill envisages complaints being made while litigation is stayed awaiting investigation by my office. In this context, efficient investigation would be absolutely paramount.

I note that the proposed section 55ZGB provides that, following a complaint to my office, a Court can make any orders it sees fit if any of the state of affairs listed in section 55ZGB (1)(b) occur. The state of affairs relevantly include where '60 days (or a longer period agreed between the applicant and the Ombudsman) pass since the complaint was made.'

In essence this provision puts a soft time limit on investigation by my office in that the Court can continue to hear the matter after that time. The complexity of complaints about perceived breaches of the model litigant obligations mean that investigation within this time period would be onerous on both my Office, and the relevant Commonwealth litigant. The experience of my Office in investigating matters that raise the model litigant obligation is that investigations extend beyond a 60 day time period.

In order to appropriately investigate a complaint it may also be necessary for my Office to speak to lawyers and witnesses involved in the case. That could inadvertently interfere with the conduct of the proceedings.

Office of Legal Services Coordination

I note that the Office of Legal Services Coordination have a role in ensuring agency compliance with the *Legal Services Directions 2017* and receive notifications from agencies about non-compliance with the model litigant obligation.