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Attorney-General's Department

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**Submission of the Australian Government Attorney-General's
Department**

**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. The Commonwealth Attorney-General's Department (the department) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to provide a submission as part of the Committee's inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (the Bill).
2. The Selection of Bills Committee Report No 15 of 2017 indicates that the Senate Committee will be inquiring into:

‘whether the bill appropriately responds to the September 2014 Productivity Commission recommendation, in its Access to Justice Report, that compliance with the model litigant obligations should be enforceable.’
3. The Productivity Commission recommendation and the Government's response are set out below. This submission provides an outline of the existing framework and identifies technical, practical and policy issues with the Bill.
4. In addition to instructing on litigation for matters falling within the department's responsibilities, the department is also responsible for administering the *Legal Services Directions 2017* (the Directions) through the Office of Legal Services Coordination (OLSC).

The Productivity Commission Report: Access to Justice Arrangements

5. In 2014, the [Productivity Commission](#) undertook a review into the accessibility of Australia's civil justice system. As part of its inquiry, the report considered the various model litigant obligation regimes that apply to Commonwealth State and Territory government litigants.
6. Recommendation 12.3 of the Productivity Commission's report¹ was that ‘compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met.’
7. On 29 April 2016, the Government responded to Recommendation 12.3. The response noted that the model litigant obligation is not intended to provide a remedy, cause of action or any personal rights in addition to those already available through administrative or judicial review (*Caporale v Deputy Commissioner of Taxation* [2013] FCA 427). The response further noted that any other approach could result in additional costs and delay in litigation involving the Commonwealth.
8. The Government also noted the existing role of the Commonwealth Ombudsman and the ability for individuals to seek a review by that body.

¹ Productivity Commission 2014, Access to Justice Arrangements, Inquiry Report No 72, Canberra, 442

The Bill

9. The Bill was introduced into the Senate on 15 November 2017 by Senator Leyonhjelm.
10. The key changes proposed in the Bill appear to be:
 - a. introducing a compliance investigation and reporting role for the Commonwealth Ombudsman regarding model litigant contraventions including actual, possible or alleged; and
 - b. giving power to the court to stay proceedings and make orders where there is an actual or possible contravention of the model litigant obligation.

Current Arrangements

The Model Litigant Obligation

11. The model litigant obligation has common law origins from 1912 in the case of *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 in which Griffith CJ stated:

‘I am sometimes inclined to think that in some parts – not all – of the Commonwealth, **the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects**, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken’ (emphasis added)
12. The Directions issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903* (the Judiciary Act) codified the obligation. Paragraph 4.2 of the Directions state that

‘[claims] are to be handled and litigation is to be conducted by the entity in accordance with the Directions on *The Commonwealth’s Obligation to Act as a Model Litigant*, at Appendix B’
13. The obligation is further described in Appendix B which states that ‘[t]he obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation’ and provides a number of examples.
14. Paragraph 11 obliges entities to report to OLSC any possible or apparent breaches of the Directions (including the model litigant obligation) or allegations of breaches the entity is aware of. Entities are also to report corrective steps that have been taken or are proposed to be taken. OLSC reviews these notifications in line with its Compliance Framework which can be found on our [website](#).

The department’s experience in administering the Directions

15. The department, through OLSC, supports and promotes awareness of the Directions and works with agencies to address systemic issues where they are identified. The department’s experience in administering the Directions is that Commonwealth entities and their legal representatives take the obligation to act as a model litigant very seriously. The

department's experience indicates that entities regularly reference the model litigant obligation in making decisions about the handling of matters and that training on the obligation is part of staff development. When complaints are made, departments will ensure resources are available to assess those complaints. This may include referring the complaint to senior staff or counsel from the private bar who have no other connection to the matter to consider the allegations in the complaint.

16. Non-compliance notifications made to OLSC are generally initiated as a result of judicial criticism, allegations made by a party in dispute with the Commonwealth and through agency self-identification.
17. In 2015-2016, OLSC received 49 notifications in relation to the model litigant obligation. The types of matters reported included allegations an agency relied on technical defences, withheld documents, commenced proceedings against a small business, caused delays in proceedings or its conduct had been the subject of judicial criticism.
18. Out of the 49 notifications received, 11 were identified as incidents of actual non-compliance with the model litigant obligation. These include instances where the agencies provided incorrect information to the court, breached privacy, caused delays or failed to properly inform the court of relevant matters. In each of the matters, agencies undertook remedial action to address the non-compliance. The number of instances of identified non-compliance is very low compared to the volume of legal matters that the Commonwealth is engaged in – while no formal count is available, the Commonwealth and its entities are involved in tens of thousands of legal matters each year.
19. In instances where OLSC considers that an agency may have misunderstood its obligations under the Directions, OLSC will work with the agency in line with the Compliance Framework to address the issue and raise the agency's awareness and understanding of the Directions.
20. Over time, OLSC's experience is that the majority of non-compliance issues are technical in nature and generally addressed quickly by the relevant agency. OLSC has also found that a substantial proportion of complaints arise from misunderstanding and/or mischaracterisation of the obligation, particularly by self-represented litigants. For example allegations may be made that an agency is non-compliant with the obligation because:
 - a. an agency sought to recover costs against a person
 - b. an agency has refused to participate in alternative dispute resolution where mediation has already occurred, or
 - c. the Commonwealth has not agreed to an order sought by the other party.
21. Where an individual is unhappy with the handling of their complaint by an agency, they may request the Commonwealth Ombudsman to undertake an investigation.

The department's analysis of the Bill

22. The department's analysis of the Bill is considered in greater detail below. In summary, the department considers the amendments in the Bill:
- a. are unnecessary
 - b. go well beyond the Productivity Commission recommendations
 - c. raise a range of practical and policy issues, and
 - d. contain drafting issues that require further consideration.
23. The department has had the benefit of reading submissions from other agencies, including from the Home Affairs Portfolio, the Department of Human Services (DHS) and the Australian Taxation Office (ATO). In this context, the department notes the extensive litigation managed by those agencies and the examples of practical issues with the Bill raised in their submissions.

The Bill is unnecessary

24. The department does not consider there is any evidence of systemic issues with agency compliance with the model litigant obligation, the way issues are identified and dealt with or that the existing compliance mechanisms are inadequate. Similarly, the Productivity Commission did not suggest there were systemic issues in relation to compliance with the Commonwealth model litigant obligation by Commonwealth entities and their representatives.
25. While the Directions are not themselves enforceable by a court, the courts use their inherent jurisdiction and civil procedure laws to oversee the Commonwealth's actions as a litigant.
26. For example, subsections 37M and 37N of the *Federal Court of Australia Act 1976* impose obligations on practitioners and litigants to ensure that litigation is conducted in a proper and efficient way. Additionally, the courts have also utilised the power to award costs and other orders against the Commonwealth where it considers it appropriate², i.e for not meeting court deadlines.
27. Litigants also have the ability to lodge a complaint with the Commonwealth Ombudsman within the Ombudsman's existing jurisdiction. Given the availability of these mechanisms, the department considers the Bill is unnecessary.
28. As noted above, reports to OLSC of non-compliance indicate the Commonwealth is largely compliant with the model litigant obligation. The extent of Commonwealth involvement in litigation compared to the relatively limited number of identified instances of

² *Phillips in the matter of Starrs & Co Pty Limited (In Liquidation) v Commissioner of Taxation* [2011] FCA 532; *Nelipa v Robertson and Commonwealth of Australia* [2008] ACTSC 16; and *Galea v Commonwealth of Australia* [2008] NSWSC 260.

non-compliance suggests that the Commonwealth is compliant with the model litigant obligation in the vast majority of cases. Of those where actual non-compliance occurs, the department notes that these have been largely limited to individual instances rather than indicating systemic and ongoing issues within an agency. This indicates that agencies are aware of their general obligation to notify OLSC even where an agency concludes it is compliant with the obligation.

29. The effectiveness of the current framework was also noted in the Productivity Commission report:

‘A review in 2007 found that the Commonwealth model litigant rules have been reasonably effective in regulating Commonwealth litigant behaviour (Cameron and Taylor-Sand 2007). Similarly, the Office of Legal Services Coordination (OLSC) said that current arrangements at the federal level are working well, with low levels of non-compliance...’³

30. In addition to being unnecessary, the department considers that the Bill would fragment and complicate the existing framework and potentially increase costs and delay litigation. Operational and practical issues are discussed below.

The Bill goes well beyond the Productivity Commission recommendations

31. As noted above, the Government Response to the Productivity Commission recommendation did not support Recommendation 12.3 as the model litigant obligation is not intended to provide a separate remedy, cause of action or any personal rights in addition to those already available through administrative or judicial review.

32. However, as the Committee has been asked to consider whether the Bill would appropriately respond to the Productivity Commission recommendations, the department further notes that the Bill would go well beyond the scope of the recommendations of the Productivity Commission. The Productivity Commission’s recommendation focuses on an avenue of complaint to the relevant ombudsmen. In contrast, the Bill proposes that:

- a. complaints about the model litigant obligation could be raised to affect a substantive proceeding, for example to seek a stay or other orders before a court, and
- b. courts would be expected to adjudicate compliance.

³ Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No 72, Canberra, 433.

Practical and policy issues with the Bill

Potential to cause delay and increase costs

33. The Bill has the potential to cause delays by
- a. increasing the complexity of proceedings
 - b. a lack of clarity on how a model litigant complaint is to be examined, and
 - c. encouraging model litigant complaints to be made in circumstances where there are incentives to extend litigation.
34. All of these consequences would substantially increase litigation costs for the Commonwealth and impose additional work on the courts, thereby increasing delays across all litigation.
35. The Bill would create a separate avenue for litigants to have proceedings stayed and would not provide a clear basis for assessing a model litigant complaint at the time of granting the stay. Litigants could be encouraged to make a complaint with the intention of extending proceedings, for example, in extradition, immigration or taxation disputes. Where a complaint is unfounded, weak, or vexatious, the Bill would unnecessarily place additional pressure on the courts.
36. Any significant additional workload for the courts and/or tribunals (if the Bill applied to tribunals), would have the effect of introducing delay for all matters and would require an assessment of associated resourcing requirements as against other government funding priorities. Similarly, the department notes the Commonwealth Ombudsman's submission that additional resources would be required to meet increases in workload for the Ombudsman.

Overly technical approach to the model litigant obligation

37. The model litigant obligation, as set out in the Directions, is purposely broad and wide reaching. The obligation is flexible and fluid allowing it to be adapted to the specific circumstances of a matter. This enables agencies to approach compliance with the obligation using a principles based approach, informed by specific circumstances, rather than simply being a technical exercise.
38. In contrast, by creating a separate complaint avenue that can be enforced by a court, the Bill could lead to a more technical approach to the obligation, either through interpretation or amendments to the Directions. Transforming the obligation into a matter to be determined and enforced by courts could encourage a re-casting of the obligation to be prescriptive and technical, rather than principles-based, to provide certainty in interpretation where it may affect substantive proceedings. The department considers that a principles-based approach is preferable as it encourages a reflective approach by entities and their legal representatives rather than simply seeking to comply with technical requirements.

The Bill is unclear

39. The department has identified a number of sources of ambiguity in the Bill.

40. In relation to the role of the Ombudsman, the Bill is unclear on:

- a. the effect of an Ombudsman's investigation and how any finding/decision should be enforced
- b. it is unclear how the Bill would interact with section 11A of the *Ombudsman Act 1976* (Ombudsman Act) (see discussion below)
- c. the extent to which the court would be required to have regard to the Ombudsman's investigation, and
- d. what would occur if there is a difference of opinion between the court and the Ombudsman.

41. Under existing process, the Commonwealth Ombudsman can make recommendations to government. The Bill does not make clear if this existing process is to continue or be varied. The Bill is also unclear on the interaction between Ombudsman investigations and the courts, for example, section 11A of the Ombudsman Act.

42. As drafted, the Bill would allow for the Ombudsman to investigate conduct before the Federal Court. However section 11A of the Ombudsman Act enables the Federal Court to make a determination on how the Ombudsman conducted or is conducting its investigation. This could result in one part of the Federal Court directly or indirectly commenting on proceedings in another part of the Federal Court.

43. The Bill does not refer to tribunals such as the Administrative Appeals Tribunal (AAT) and proceedings heard by tribunals, rather it focusses on proceedings in courts. The model litigant obligations apply to Commonwealth litigants who appear before tribunals, inquiries, and in arbitration and other alternative dispute resolution (see Note 1 of Appendix B). The department considers that limiting the application of the model litigant obligation to courts only, would fragment its operation, cause inconsistencies and not be in line with the intended objectives of the model litigant obligation.

44. Tribunals are designed to be a more cost effective and informal alternative to the court system. Differential and inconsistent application of the Bill in separate forums may drive litigants to more formal and expensive forums to allow them to make claims based around the model litigant obligation.

45. The department also agrees with the submission of the ATO on the issue of uncertainty as to the Ombudsman's jurisdiction in relation to litigation involving the Commonwealth within the state/territory court systems.

Consideration of government policy by the court

46. It is likely that any review of the Commonwealth's conduct in legal proceedings by the court would encompass factors of the nature and implementation of government policy. For instance, model litigant complaints could include consideration of the fairness and reasonableness of a particular settlement offer, the nature of the arguments raised by the Commonwealth or engaging in alternative dispute resolution.
47. In adjudicating the alleged non-compliance, the court may be drawn into making assessments about government policy and, by making orders, could superimpose its view over that of the government in an area of policy.

Drafting issues

48. The department has identified a number of issues with the drafting of the Bill. For example:

- a. The proposed definition of 'Commonwealth litigant' in the Bill would unreasonably expand responsibility to comply with the Directions to a much larger group of persons and bodies. It would include former employees of the Commonwealth, former members of the Defence Force and any other person and body that the Australian Government Solicitor may provide services to under subsection 55N(1) of the Judiciary Act. Subsection 55N(1) was never intended to be utilised in this manner.
- b. The Bill would result in a circular definition of the model litigant obligation. The Bill would include a Judiciary Act definition that references the Directions and an Ombudsman Act definition that reference the Judiciary Act. This would have the effect of modifying the operation of those Acts by means of delegated legislation.

The department considers that, in general, primary legislation should not create a power to make a legislative instrument that can modify the operation of an Act, unless the legislative instrument is only intended to make minor or technical modifications to keep the primary legislation up to date. Given the significant consequences the Bill proposes to impose for contravention of the model litigant obligation, having the obligation defined wholly within a legislative instrument could be an inappropriate delegation.

- c. The Bill does not make clear the options available to a litigant who does not have legal proceedings on foot.
- d. The Bill does not make it clear what is meant by 'court' or which 'court' is meant to make orders in relation to any complaint. For example, it is not clear whether one court could make orders relating to a model litigant complaint when the substantive issues are being heard in another court or are not before any court.
- e. The interaction between the making and/or investigation of an Ombudsman complaint and any court action is unclear, as discussed in more detail above.

49. The above list of drafting issues is not intended to be exhaustive.

Conclusion

50. The department considers that there are already effective processes in place to ensure Commonwealth compliance with the model litigant obligation. These processes include an avenue of complaint to the Commonwealth Ombudsman. The department considers that the key elements of the Productivity Commission's recommendation are therefore already in place at the Commonwealth level.
51. The department expects that the changes proposed in the Bill would result in increased delay, costs, inconsistency and uncertainty for all parties and for the courts.
52. The department also draws the Committees attention to the [Secretary's Review of Commonwealth Legal Services](#) (the review), published by the Attorney-General's Department, which made a number of recommendations about how the Commonwealth conducts legal work. Several of those recommendations emphasise improved understanding and consistent training to government lawyers regarding their unique role, enhancing agency compliance with the Directions and strengthening the role of OLSC. These recommendations would further build understanding of, and compliance with, the model litigant obligation by Commonwealth agencies, their staff and legal representatives.
53. The review has been provided to the government for consideration.