



Attn: Mr Tim Watling
Committee Secretary
Senate Legal and Constitution Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

To: Senator Ian Macdonald
Committee Chair

Ref: **Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017**
(The 'Leyonhjelm Model Litigant Bill')

Dear Chair and Committee Members

Civil Liberties Australia thanks you for the opportunity to contribute to the discussion about this important model litigant initiative. We strongly support the intent of the Bill, which is to adapt the expertise of the Commonwealth Ombudsman towards:

1. **Access to protection:** ensuring ordinary citizens have appropriate access to greater protection when dealing with the fiscal, legal and temporal might of the Commonwealth;
2. **Calculating the problem:** creating a simple and practical way that legitimate complaints about the Commonwealth's not meeting its obligations can be brought to light and assessed, and that corrective mechanisms can be put in place, if needed; and
3. **Reporting annually:** provide for annual reporting by the Commonwealth Ombudsman of the extent of non-compliance with Model Litigant Rules, as contained in the Legal Services Directions under the current control of the Office of Legal Services Coordination in the Attorney-General's Department (AGD).

Taking the last point first.

3. Report annually

The AGD does not appear to be meeting its current formal obligation to report on breaches of Model Litigant Principles in its annual report.

The Office of Legal Services Coordination (OLSC) does not appear to be covered in the Annual Report of the Attorney-General's Department 2016-17. If it is covered, CLA could not find the coverage.

There was no listing for 'OLSC' in the 'Glossary of abbreviations and acronyms' on p164 of the annual report, under Part 6 'Aids to access'. The Office of Legal Services Coordination does not appear in the Index, p170-175. There was no listing for Model Litigant Principles (MLP) in the text or the Index.

Does the above matter?

Well, yes. Under its own Guidance Note (currently on its website) in relation to the Legal Services Directions, which contain the mandatory reporting requirement of breaches of MLP, the AGD is responsible for:

9. The Attorney-General is briefed on the Commonwealth's non-compliance with the (Legal Services) Directions. In addition, statistical information on non-compliance is published in the Attorney-General's Department Annual Report.

Source: GUIDANCE NOTE 3

Compliance with the Legal Services Directions 2005 OLSC's role

The fact that there is no report whatsoever in the 2016-17 AGD Annual Report would appear to illustrate a contempt with which the AGD treats the MLP and LSD requirements.

The 'Leyonhjelm Bill' would ensure that a proper authority, the Commonwealth Ombudsman, would take the MLP requirements on the government seriously, and would report annually. Annual reporting would bring to light the extent of a problem CLA believes is now kept hidden.

Note: the only mention of the OLSC-MLP area we could find in the 2016-17 AGD annual report is this nebulous sentence:

"We helped government agencies comply with the *Legal Services Directions 2017...*"

CLA believes the MLP system is purposely designed, and is 'managed' within the AGD, to reduce the chances of poor litigant behaviour by the Commonwealth coming to light. We have been monitoring the MLP and OLSC for about 12 years. At the start of that period, the OLSC reported on its website cases that had breached the MLP rules. For a decade, there has been no such public reporting. It has become impossible to find out whether the extensive anecdotal reports of Commonwealth MLP breaches are true, or not.

There is an urgent need to bring the Commonwealth to account for its behaviour in the courts. To do that, the first requirement is a reliable count, and actual cases.

2. Calculate the problem

Without any reporting of accurate occurrences of poor Commonwealth behaviour, as evidenced by the absence of reporting in the AGD annual report of 2016-17, the extent of the probable problem will increase. Simply, if people are getting away with not obeying the rules, the numbers not obeying the rules will increase over time.

The introduction of outsourced legal services by Commonwealth departments and agencies last decade exacerbated the likelihood there would be problems. Individual government entities are running their own legal cases using many external consultant law firms. The former centralised control and monitoring of behaviour around Commonwealth legal cases has disappeared.

The requirement of OLSC and the MLP reporting measures were meant to be a curb on poor behaviour. However, the OLSC adopted a hands-off approach, by which only self-reporting by a government entity of a breach was required. Naturally, the number of reported breaches dwindled.

To make the system work, there must be an active 'policing' of the requirement to abide by the law. For more than a decade, there has been no 'policing'. No part of AGD has actively sought to undertake random inquiries within departments or agencies, or within the disparate legal firms servicing them.

More importantly, there has been no attempt to find out how big a problem non-adherence to the MLP is. There are simple ways the OLSC-AGD could actively source information of possible breaches of MLP:

- request or require a one-off, or annual, report by magistrates, judges and tribunal members; and
- advertise among the public, small law firms and law and bar bodies for examples.

The government has a rancid reputation among small law firms and court-aware members of the public as a bully in litigation. If the government was abiding by MLP, it would not have such a reputation.

1. Access to protection

You would think that AGD should be to the 'go to' department for the little guy to get a fair go in litigation with the Commonwealth. If you thought that, you'd be in for a shock.

AGD actively breaches the MLP. It even reports its own breaches of the MLP in its annual report, while NOT reporting the breaches of the entities it is meant to report.

Quantifiable contingencies

The department estimates \$534,000 of contingent liabilities in respect of claims for damages/costs (2016: nil). This amount represents an estimate of the department's liability based on precedent in such cases. The department is defending the claims.

The department estimates \$645,000 of contingent assets in respect of claims for damages/costs (2016: \$345,000). This amount represents the department's estimate of claims against persons/organisations based on ongoing cases. The estimate is based on precedent in such cases.

The 'Quantifiable contingencies' report indicates that AGD is withholding \$534,000 of funds it should have paid out "based on precedent in such cases". AGD is defending the claims. (Note: there is no 'ongoing' in the first paragraph).

This is AGD admitting that – despite settled case law – it will hold people to ransom by not paying them what AGD believes they are due in terms of damages/costs. It's hard to know how many cases this sum might cover, possibly 5-10. So, you have a major government department, that has, according to its annual report, \$44 million cash on hand, withholding the payments of relatively miniscule sums to (probably) families and small businesses, who continue to go through the agony of not knowing how their case will turn out, or when they will get costs/damages.

Even when AGD believes they, the little guys, are in the right.

That's a fair indication of the extent to which the Model Litigant Principles need to be under the control of a different system than they are now. The Leyonhjelm Bill would achieve improvement in a mightily flawed system.

CLA Civil Liberties Australia A04043
Box 7438 Fisher ACT Australia
Email:
Web: www.cla.asn.au

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Lead author: Bill Rowlings

Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards that Australia has traditionally enjoyed and continues to aspire to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.