



Australian Government
Department of Home Affairs

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

**Senate Legal and Constitutional Affairs Legislation
Committee**

Home Affairs Portfolio Joint Submission

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Introduction

The Home Affairs Portfolio (Portfolio), comprising of the Department of Home Affairs (Department), the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC) and the Australian Border Force (ABF), welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) Inquiry into the *Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017* (the Bill), which was introduced into Parliament on 15 November 2017.

The Bill seeks to subject Commonwealth litigants to enforceable model litigant obligations. It also seeks to establish a process for the Commonwealth Ombudsman to investigate complaints about contraventions of the model litigant obligations.

This submission provides a response on behalf of the Portfolio to the reasons for referral/principal issues for consideration by the Selection of Bills Committee and outlines how the Bill will impact the Portfolio's litigation caseload.

Reason for referral/principal issue for consideration

The reason for referral/principal issue for consideration by the Committee as identified in the Selection of Bills Committee Report No. 15 of 2017 is:

- To examine whether the Bill appropriately responds to the recommendation in the Productivity Commission's 2014, *Access to Justice Arrangements: Overview, Inquiry Report No 72 (Access to Justice Report)* that the model litigant obligations should be enforceable.

Background

Current approach to model litigant obligations

The model litigant obligations are outlined in in paragraph 4.2 and Appendix B of the *Legal Services Directions 2017* (the Directions). The Directions are a set of legally binding rules issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1901*. The Directions are administered by the Office of Legal Services Coordination (OLSC) on behalf of the Attorney-General.

Broadly, the model litigant obligations require Commonwealth agencies (and their external legal services providers) to act fairly and honestly, and with the highest standards, during the conduct of litigation and in managing claims made against the Commonwealth or an agency. This obligation can also extend beyond the legal and professional responsibilities of lawyers.

OLSC monitors compliance of the model litigant obligations through the mandatory requirements under the Compliance Framework as outlined in the Directions. Relevantly, the mandatory requirements include agency self-notification of alleged and actual breaches of the model litigant obligations (as well as the Directions more generally) and annual compliance certificates. The Directions also provide a mechanism for the Attorney-General to impose a sanction for non-compliance with the Directions.

The Portfolio recognises that the model litigant obligations as outlined in the Directions are similar to the ethical and professional obligations of lawyers as defined under the relevant courts rules or provided for by legal professional associations.

Recommendations in the Access to Justice Report

The Access to Justice Report was publically released on 3 December 2014. This report addresses the Australian Government's request to the Productivity Commission to undertake an inquiry into Australia's system of civil dispute resolution with a focus on restraining costs and promoting access to justice and equality before the law.

Amongst other recommendations, the Access to Justice Report makes a recommendation with regard to the model litigation obligations. Relevantly, Recommendation 12.3 provides that:

The Australian, State and Territory governments (including local governments) and their agencies and legal representative should be subject to model litigant obligations.

- *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.*
- *State and Territory governments should provide appropriate assistance for local governments to develop programs to meet these obligations.*

As noted in the summary of the Access to Justice Report, the recommendation appears to arise from concerns expressed about the enforceability of and compliance with the Directions, including the lack of incentives to force government agencies to comply. Further, the Access to Justice Report proposes that there needs to be an independent formal mechanism for investigating complaints and enforcing compliance with the model litigant obligations through the Commonwealth Ombudsman.

On 29 April 2016, Commonwealth Government responded to the Access to Justice Report and the recommendations within it. In this response, it was noted that compliance with the model litigant obligations is an issue for the Attorney-General and the relevant Commonwealth agency.

The Bill

The Bill is intended to give effect to the Productivity's Commission's recommendation regarding the way in which the model litigant obligations should be enforced as it applies to Commonwealth litigants. The Bill appears to maintain the current practice of the Attorney-General obliging Commonwealth litigants to act in accordance with the model litigant obligations, while proposing a number of amendments to the *Judiciary Act 1903* and the *Ombudsman Act 1976* for the purposes of enforcing, reviewing and reporting on contraventions of the model litigant obligations.

Broadly, these amendments appear to include:

- providing the courts with the power to stay proceedings where there is an actual or alleged contravention of the model litigant obligations; and
- extending the Commonwealth Ombudsman's powers to include investigating and reporting on complaints regarding the model litigant obligations.

Portfolio submission

The Portfolio considers that the enactment of the Bill may have significant impacts on the timely and efficient resolution of litigation proceedings which the Portfolio (including matters naming the Portfolio Minister's or agencies as a party to the proceedings) or the Commonwealth are a party to. Further, the Portfolio considers that the proposed amendments are likely to have the effect of increasing costs (for all parties) in resolving litigation proceedings on foot.

Due to the diverse nature of the Portfolio's business, there are a significant number of matters before the courts involving the Portfolio which are likely to be impacted by the amendments proposed within the Bill. Outlined below are the implications for the ACIC and the Department's litigation caseloads. To the extent that these implications are relevant to the AFP's litigation caseload, the AFP also supports these views.

The Department's Litigation Caseload

The Minister for Home Affairs and the Minister for Immigration and Border Protection (the Minister) are routinely named as a party to litigation proceedings before the courts due to the large number of administrative decisions regularly made by the Minister or his delegate, particularly in relation to migration and citizenship decisions. All litigation relevant to the ABF is managed by the Department.

As at 24 January 2018, the Department was managing an active litigation caseload of 7425 matters. Of this caseload, 7193 matters related to the migration and citizenship caseload.

The number of active migration and citizenship litigation matters has risen consistently since 2011, when the active administrative law caseload was 1009. The increased burden this caseload places on the courts, in particular the Federal Circuit Court and the Federal Court, continues to impact on the timely resolution of litigation proceedings. As at 31 December 2017, across all courts it took an average of 351 days for a litigation matter in this caseload to be resolved. A number of active matters are now being listed for final hearing in 2021, meaning that matters in the future are expected to take several years to resolve.

The Department also considers that it is particularly critical to ensure the swift resolution of litigation in circumstances where parties to the proceedings are residing in immigration detention.

Given these issues, where possible, the Department assists the courts in identifying mechanisms for the efficient management of its litigation caseload, but understands that resourcing of the courts remains an ongoing issue.

Further, judicial review applicants are typically granted a Bridging visa to enable them to remain in Australia until their litigation proceedings are resolved. With the average timeframe for resolution of proceedings currently approaching one year, this provides an incentive for some applicants to commence litigation proceedings to prolong their stay in Australia. As this timeframe increases to several years, the Department expects the incentive to commence litigation proceedings to become heightened.

The Department notes that while the number of applications for judicial review has risen significantly since 2011, the Department's success rate in hearings before the courts has remained stable. Between the 2010-11 and 2016-17 financial years, the Department maintained an average success rate before the courts in its migration caseload of 93%. In 2017-18 financial year-to-date, the Department's success rate before the courts in its migration caseload is 94%. In accordance with the Directions, the Department only defends or appeals decisions where there is a reasonable prospect of success or it is otherwise justified in the public interest. This ensures that, where possible, matters that are not required to proceed to a final hearing are swiftly resolved.

ACIC's Litigation Caseload

Due to the nature of ACIC's business, it operates in a contested environment and is often subject to legal challenge as a normal part of its operations. This may occur in the context of applications in the Federal Court for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* or section 39B of the *Judiciary Act 1903*, in respect of Examiner's administrative decision to issue a summons under the *Australian Crime Commission Act 2002* or as part of the criminal justice process, such as in a contested subpoena. Judicial review of these administrative decision matters may take over a year, and on occasion, the initial decision is appealed.

Current Compliance Framework Process

The Portfolio is committed to ensuring it complies with the model litigant obligations given the volume of the Portfolio's high-profile, sensitive litigation. Outlined below is a brief summary about how each Portfolio agency currently monitors compliance with the model litigant obligations (and the obligations under the Directions more broadly) as required by the Compliance Framework within the Directions.

The Department

A dedicated team within the Department is responsible for reviewing all allegations of contraventions of the model litigant obligations and reporting on these to OLSC within AGD. The vast majority of these investigations are determined to be spurious and/or unsubstantiated by the Department and the findings are referred to OLSC.

The Department also uses these investigations to identify and implement improvements to current practices to ensure the Department continues to act fairly and consistently across its entire litigation caseload.

AFP

The AFP takes its responsibilities under the Directions and the Compliance Framework very seriously. Where allegations of non-compliance with model litigant requirements, or the Directions more broadly, are raised during legal proceedings involving the AFP (including conduct by external legal services providers instructed by the AFP) the relevant Deputy General Counsel immediately raises the issue with the responsible AFP General Counsel for consideration and discussion of the issue, to ensure that the AFP considers and appropriately responds to all allegations of non-compliance.

The General Counsel will notify OLSC of the allegations pursuant to the Compliance Framework. The AFP, working closely with OLSC, investigates and addresses any concerns or allegations of non-compliance that have been identified. The AFP would consider whether any remedial action is required if a breach of the model litigant obligations were to be identified following such investigation. If remedial action were required, this action would be prioritised and any appropriate training implemented.

ACIC

ACIC Legal Service monitors all litigation involving the ACIC and ensures compliance with the ACIC's requirements under the Directions, including with the model litigant obligations, in line with the OLSC guidelines and processes. There have been no identified breaches under the Directions and the ACIC continues to work with OLSC to ensure the ACIC's ongoing compliance with the obligations under the Directions including the model litigant rules. The ACIC would refer any allegation of the breach to OLSC and follow up on reporting court outcomes to OLSC.

Potential for further delay in the resolution of litigation proceedings

The Portfolio considers that while the process outlined in this Bill is intended to strengthen the enforceability of model litigant obligations on Commonwealth litigants, it is likely to create further delays in the amount of time taken to resolve litigation proceedings.

Relevantly, the Bill provides an avenue for courts to stay proceedings in circumstances where complaints about contraventions of the model litigant obligations have been made. The Portfolio considers that the Bill will likely create an incentive for parties to the proceedings to raise alleged contraventions of the model litigant obligations before the courts, in order to further delay the resolution of their proceedings. If the courts were inclined to order stays in proceedings for this reason, an increase to the already lengthy timeframe for resolution of proceedings may result. Any additional delay to the resolution of proceedings is likely to increase the costs incurred by all parties to the proceedings.

Additionally, in the event that the above risk is realised, the Department considers that this may create a further incentive for applicants in the migration and citizenship caseload to commence judicial review proceedings, which in turn would allow them to remain in Australia for the period of time in which it takes for their proceedings to be resolved.

Further, the ACIC holds concerns that the proposed amendments within the Bill will add further delay in the resolution of litigation in an environment in which the overriding public interest considerations are to see criminal investigations and criminal intelligence gathering and in turn any subsequent prosecutions, be undertaken in an efficient and timely manner, i.e. serious and organised crimes discovered and disrupted and perpetrators brought to justice in a timely way. The ACIC is also concerned that the proposed exemption for 'criminal prosecutions and related proceedings' is insufficient, at least in respect of judicial review proceedings, to take account of the ACIC's unique operating environment where administrative decisions are aligned with criminal intelligence gathering and criminal investigations into serious and organised crime, often leading to criminal prosecutions. Planned measures for challenges arising by way of judicial review to not be exempt, appears to import a level of policy inconsistency into the proposed legislation.

Alternative opportunities for reform

Given the Portfolio's commitment to ensuring it complies with the model litigant obligations, it welcomes the opportunity to actively engage with the Attorney-General's Department to consider methods to strengthen the current process, as recently recommended in the Attorney-General's Department's Secretary's Review of Commonwealth Legal Services (the Secretary's Review), published on 8 November 2017.

The Secretary's Review makes a number of recommendations in relation to the provision of Commonwealth legal services work and the Directions. Relevantly, Recommendation 4 (c) seeks to clarify the role of and strengthen the mechanisms for enforcing the model litigant obligations.

As this recommendation identifies, further consultation and scrutiny is needed of the Compliance Framework under the Directions prior to any amendments being made, to ensure the desired outcome is achieved. The Portfolio welcomes the opportunity participate in this process and considers it the appropriate method for implementing any changes to the Compliance Framework put forward in the Access to Justice Report.

Noting the above, further consideration should be given to whether the Commonwealth Ombudsman is the most appropriate body to investigate and report on allegations of contraventions to the model litigant obligations, as proposed in this Bill.