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Legal and Constitutional Affairs Legislation Committee

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Dear Mr Watling

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION  
COMMITTEE**

**INQUIRY INTO THE JUDICIARY AMENDMENT  
(COMMONWEALTH MODEL LITIGANT OBLIGATIONS) BILL 2017**

Thank you for your email dated 13 December 2017 in relation to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017.

**Introduction and General Comments**

1. The Department of Human Services (the Department) appreciates the opportunity provided by the Senate Legal and Constitutional Affairs Legislation Committee to lodge submissions in relation to the Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (Bill).
2. The Department is required to comply with the Legal Services Directions 2017 (Directions) as issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903* (Judiciary Act). The Department is, accordingly, required to handle claims and conduct litigation in accordance with the Directions, including in accordance with paragraph 4.2 (*The Model Litigant Obligation*) and Appendix B of the Directions (*The Commonwealth's obligation to act as a model litigant*) (collectively, the Model Litigant Obligations).

3. In June 2013, the Australian Government tasked the Australian Government Productivity Commission (Commission) with inquiring into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law.<sup>1</sup>
4. As part of its inquiry, the Commission considered the operation of the Model Litigant Obligations.<sup>2</sup> In its Report into Access to Justice Arrangements (the Report), the Commission noted that, while there was general support for Model Litigant Obligations, some reservations were expressed about their operation in terms of coverage, content and compliance.
5. The Commission relevantly recommended (Recommendation 12.3) that:<sup>3</sup>

The Australian, State and Territory governments (including local governments) and their agencies and legal representatives 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.

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6. On 29 April 2016, the Attorney-General publicly released the Australian Government's response to the Commission's report.<sup>4</sup> In relation to Recommendation 12.3, the Australian Government noted:
  - That the Model Litigant Obligations (as then set out in the Legal Services Directions 2005) are "not intended to provide a remedy, cause of action or any personal rights in addition to those already available through administrative or judicial review".
  - That the question of compliance with the Directions, including the Model Litigant Obligations, is "a matter between the Attorney-General and the relevant Commonwealth agency or Department [and] any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth".<sup>5</sup>

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<sup>1</sup> Australian Government Productivity Commission, Access to Justice Arrangements, Productivity Commission Inquiry Report, Volume 1, No 72, 5 September 2014, at page iv.

<sup>2</sup> The use of the term 'model litigant obligations' here relates to the discussion of the obligations generally across all tiers of government as contained in the report of the Commission, as distinct from the term 'Model Litigant Obligations' as defined in paragraph 2 above.

<sup>3</sup> Ibid, at page 54.

<sup>4</sup> Australian Government, Attorney-General, 'Response to the Productivity Commission's report into access to justice arrangements', 29 April 2016.

<sup>5</sup> Ibid page 4.

7. The Explanatory Memorandum states that the Bill would enact the recommendations of the Commission regarding the Model Litigant Obligations as they relate to the Commonwealth. The Department's overarching concern is that the provisions of the Bill go well beyond the recommendations of the Commission.
8. As a high-frequency participant in merits and judicial review in Commonwealth tribunals and courts, ensuring compliance with the Model Litigant Obligations is of the utmost importance to the Department, its officers and its external legal service providers.
9. While the Department considers that the Model Litigant Obligations serve a clear public good and endeavours to ensure compliance with the Model Litigant Obligations, the Department has significant reservations in relation to the Bill. In particular, the proposed changes may encourage meritless or spurious allegations of breach of the Model Litigant Obligations. Moreover, irrespective of the merit of any allegation of breach (or likely breach), the Bill would result in a significant increase in delays in, and commensurate increase in the costs of, Commonwealth litigation with negligible (if any) additional benefit to litigants and the general public. Additionally, increased delays in Commonwealth litigation would have an adverse impact on tribunals and courts and the administration of justice generally.
10. The Department's specific concerns are detailed below.

#### **Appropriateness of Current Enforcement Mechanisms**

11. It is the Department's view that the current system of review and enforcement of the Model Litigant Obligations is appropriate and effective.
12. The Office of Legal Services Coordination (OLSC) is responsible for the administration of the Directions and the Model Litigant Obligations. The OLSC is best-placed to interpret, review and ensure compliance with the Directions. The OLSC does not investigate allegations of actual or potential non-compliance with the Model Litigant Obligations apart from in exceptional circumstances (such as the detection of systemic issues within an agency or across a particular sphere of Commonwealth litigation). However, the OLSC does consider every report of alleged or actual breach. The OLSC can obtain additional information from an agency in relation to an allegation of breach, and may require an agency to take additional steps in relation to that matter (see paragraph 8 of Guidance Note 3 'Compliance with the Legal Service Directions 2005' issued by the OLSC).
13. Additionally, the OLSC supports agency compliance with the Directions and the Model Litigant Obligations through education programmes and other mechanisms (paragraph 2 of the Guidance Note).

14. The accountable authority of an agency has responsibility for ensuring comprehensive and accurate reporting is undertaken by their agency (paragraph 7 of the Guidance Note). The responsibilities of the accountable authority of an agency would also extend to ensuring all officers within that agency have knowledge of, and are compliant with, the Directions and the Model Litigant Obligations.
15. The Directions are made by the Attorney-General pursuant to section 55ZF of the Judiciary Act. Accordingly, the OLSC is best-placed to interpret the intentions of the Commonwealth's first law officer in respect of the content of the Directions. It would be problematic if the Commonwealth Ombudsman (Ombudsman) was placed in the position of having to determine what was intended by the Attorney-General in interpreting the content of the Directions. It is possible that the Ombudsman could adopt an interpretation of the Model Litigant Obligations that did not accord with the intention of the Attorney-General.
16. As noted above, Recommendation 12.3 of the Report was to the effect that mechanisms for monitoring and enforcing compliance with the Model Litigant Obligations should include the ability for a litigant to complain to a Government Ombudsman in respect of alleged breach. Every litigant against the Commonwealth presently has the ability to seek Ombudsman review of any aspect of that litigation (see sections 4, 5 and 8 of the *Ombudsman Act 1976*).
17. As a general proposition, any action taken (or not taken) by a Commonwealth litigant or Commonwealth officer in compliance, or in good faith in purported compliance, with the Directions will not be actionable (section 55ZI of the Judiciary Act). However, this does not mean that the Directions and the Model Litigant obligations are "toothless". The Attorney-General may impose sanctions for non-compliance with the Directions, including the Model Litigant Obligations (paragraph 14.1 of the Directions). Superior courts have the inherent discretionary power to make any orders and directions necessary and appropriate for the administration of justice in their respective jurisdictions; and tribunals generally have the power to "stand in the shoes of the decision-maker" and make the correct or preferable decision.
18. Additionally, courts and tribunals have the ability to comment (positively or negatively) in open court and in written judgments on the conduct of Commonwealth litigants and Commonwealth officers. The reputational risk and adverse consequences of negative commentary are significant.

### **Increased Delay in, and Cost of, Litigation**

19. There is a real risk that the Bill will lead to a significant increase in the number of unmeritorious allegations of actual or potential breach of the Model Litigant Obligations, resulting in delays in, and increased costs of, Commonwealth litigation.
20. The Department acts on behalf of the Secretary, Department of Social Services and the Child Support Registrar in applications for merits review in the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT 1) and the General Division of the Administrative Appeals Tribunal (AAT 2). In the 2016/17 financial year, the Department acted or appeared in more than 15,000 matters in AAT 1 and AAT 2, and those matters accounted for the bulk of litigation work undertaken by the Department.
21. Of particular concern to the Department is Item 4 of the Bill (proposed section 55ZGA). That Item provides for proceedings to be stayed where a complaint has been made to the Ombudsman that a Commonwealth litigant (or Commonwealth officer or external legal service provider) has contravened, or is likely to contravene, the Model Litigant Obligations. That provision could be utilised as a delaying tactic by litigants with unmeritorious claims or by claimants seeking to exert undue pressure on the Commonwealth.
22. Significantly, the Bill would result in increased delay and cost irrespective of the merits of, or motivation behind, any alleged breach or likely breach of the Model Litigant Obligations. Under the Bill, wherever a litigant makes an allegation of breach, or likely breach, to the Ombudsman and seeks a stay, the court has the power to grant a stay of the whole or part of the relevant proceeding (and subject to conditions). The Bill is unclear as to whether a stay is granted (pursuant to proposed section 55ZGA) to allow the investigations detailed in proposed section 55ZGB(1)(b). If that were not the case, it is difficult to determine what benefit the stay provides to the litigant making a bona fide allegation of breach of the Model Litigant Obligations.
23. It is noteworthy that the threshold prescribed in Item 4 (proposed section 55ZGA) for securing a stay is low. A litigant need only make a complaint to the Ombudsman that a Commonwealth litigant (or Commonwealth officer or legal service provider) has contravened, or is likely to contravene, the Model Litigant Obligations in order to obtain a stay of proceedings, provided that the court forms the view that a stay is desirable. Such a provision could be used to seek (and obtain) a stay of proceedings in situations where a stay would not ordinarily be granted (for example, where there is a late application for adjournment of a hearing on otherwise inadequate grounds).

24. Additional difficulties exist in respect of Item 4 of the Bill (proposed sections 55ZGA and 55ZGB) in relation to how a court is to approach an allegation that a Commonwealth litigant (or Commonwealth officer or external legal service provider) is “likely to contravene” the Model Litigant Obligations. How a litigant (particularly if self-represented) is to discharge the relevant burden of proof is unclear. For example: what is the requisite degree of “likelihood”; and is the evidence required to be subject to a *Briginshaw* (or “sliding”) scale, on the basis that the greater the severity of the likely breach and any potential sanction, the more cogent and compelling is the evidence required?<sup>6</sup> Is a litigant able to rely on historical actual or alleged conduct of the same agency (or other agencies) in related or unrelated matters?
25. Similarly, the Bill is unclear as to the operation of proposed section 55ZGB. It is clear that the section only applies if a litigant has made a complaint that a Commonwealth litigant (or Commonwealth officer or representative) has contravened or is likely to contravene the Model Litigant Obligations, and one of the procedural or investigative steps detailed in proposed section 55ZGB(1)(b) has occurred. It is also clear that a court may only make substantive orders (pursuant to proposed section 55ZGB(2)), where it is satisfied a Commonwealth litigant (or Commonwealth officer or representative) has contravened, or is likely to contravene, the Model Litigant Obligations. What is not clear is how the court reaches the necessary level of satisfaction in relation to any actual or likely breach.
26. If the Ombudsman, or a person to whom the Ombudsman transfers the complaint, completes their investigation (see proposed sections 55ZGB(1)(b)(i) and 55ZGB(1)(b)(iii), respectively), what role does that investigation play? Is the investigation to be the subject of a report? If so, is that report to be adduced as evidence before the relevant court? What opportunity does the Commonwealth have to respond to that report?
27. Conversely, if the Ombudsman, or a person to whom the Ombudsman transfers the complaint, decides not to investigate or not to continue any investigation (see proposed sections 55ZGB(1)(b)(ii) and 55ZGB(1)(b)(iv), respectively), or 60 days passes since the complaint was made, without extension (section 55ZGB(1)(b)(v)), is the court to conduct its own enquiries by way of seeking evidence from the relevant parties? If so, this will lead to further delay, cost, and other adverse impacts on the administration of justice.
28. As a general proposition, any increase in the number of alleged breaches of the Model Litigant Obligations would have an adverse impact on the workload of courts and tribunals generally and, accordingly, an adverse impact on other court and tribunal-users and on the administration of justice and the efficient use of court resources.<sup>7</sup>

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<sup>6</sup> See *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>7</sup> See *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217-18 (Gummow, Hayne, Crennan, Keifel and Bell JJ).

## Adverse Impact on the Development of the Law

29. There is considerable scope for “reasonable minds” to disagree about what might or might not constitute a breach (or likely breach) of the Model Litigant Obligations.<sup>8</sup> It has been recognised that the Model Litigant Obligations are not intended to oblige the Commonwealth to “fight with one hand behind its back”.<sup>9</sup> 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.<sup>10</sup>
30. However, the Bill may inhibit the Commonwealth from protecting its legal interests as comprehensively as possible in some circumstances. It is not difficult to envisage a Commonwealth litigant (or Commonwealth officer or representative) who may possibly be exposed to civil or criminal sanction (pursuant to Items 5 and 6 of the Bill: proposed section 55Z1), being less likely to litigate a novel but arguable point.<sup>11</sup> This could have a significant adverse impact on the advancement and development of the law.

## Civil and Criminal Sanctions for “Good Faith” Breach

31. Items 5 and 6 of the Bill are intended to remove from the Judiciary Act the protection from civil and criminal sanction presently provided to Commonwealth litigants (and Commonwealth officers and representatives) in respect of a breach of the Model Litigant Obligations in circumstances where the relevant breach occurred “in good faith and in purported compliance” with those obligations.
32. This aspect of the Bill would result in potential civil or criminal sanction for Commonwealth litigants (and Commonwealth officers and external legal service providers and their employed lawyers) in respect of inadvertent or unintentional breaches of the Model Litigant Obligations despite the absence of intention or “bad faith”. That is, even where the Commonwealth litigant (or any relevant individual) has acted in good faith and honestly believing that their conduct complied with the Model Litigant Obligations, they may still be subject to civil liability or criminal prosecution in respect of a technical or inadvertent breach.

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<sup>8</sup> For a clear and recent example of judges disagreeing about whether conduct breaches the Model Litigant Obligations see *Shord v Commissioner of Taxation* [2017] FCAFC 167, in particular at [100] per Siopis and White JJ, where their Honours noted that they “expressly disassociate ourselves from the observations of Logan J which may be construed as asserting [a breach of the model litigant obligations]”.

<sup>9</sup> *Brandon v Commonwealth of Australia* [2005] FCA 109 at [11] per Whitlam J.

<sup>10</sup> Note 4 to Item 2 of the Model Litigant Obligations at Appendix B of the *Legal Services Directions 2017*.

<sup>11</sup> Cf. *Secretary, Department of Social Services and Commonwealth of Australia v Francesco Cassaniti and Maria Cassaniti (No. 2)* [2015] NSWSC 1795 at [30]-[31].

33. Moreover, establishing, through the Bill, personal civil or criminal liability on the part of a Commonwealth officer in respect of a technical or inadvertent breach of the Model Litigant Obligations (in the absence of “bad faith”) is potentially contradictory to the principles of vicarious liability. The principles of vicarious liability apply to negligence claims against the Commonwealth in respect of inadvertent conduct of individual officers undertaken (in “good faith”) in the ordinary course of their duties as an officer of the Commonwealth, but which is later adjudged to be negligent. The proposal in the Bill would mean an officer may be personally liable for inadvertent conduct that contravenes the Model Litigant Obligations irrespective of whether the claimant has suffered loss, injury or damage. Under the principles of vicarious liability, an officer will not be personally liable for inadvertent conduct (in the form of negligence) that caused the claimant to suffer loss, injury or damage. These approaches are clearly inconsistent.

#### **Unsuitability to Proceedings in the AAT 1 and AAT 2**

34. The Model Litigant Obligations extend to the Department’s involvement in merits review proceedings in the AAT 1 and the AAT 2. As noted above, those matters form the majority of the Department’s overall litigation caseload. However, the Bill does not define the term “court” as used in Items 4 and 5 of the Bill. Nor does the Bill seek to amend the (relatively limited) application of the Judiciary Act, relating expressly to the exercise of judicial power of the Commonwealth in the High Court of Australia and the Federal Court of Australia. In short, it is not clear to what “courts” Item 4 of the Bill (proposed sections 55ZGA and 55ZGB) applies.
35. Additionally, the AAT 1 and AAT 2 are part of the continuum of administrative decision-making entities and processes operating within the Executive. The overarching goal of the Administrative Appeals Tribunal is the provision of merits review processes that are accessible, fair, just, economical, informal, quick, and proportionate to the importance and complexity of the matter under review (see sections 33(1AA) and (1AB) of the *Administrative Appeals Tribunal Act 1975*). To that end, the AAT 1 and AAT2 are, almost invariably, jurisdictions in which no costs orders are made.
36. However, the sanctions that a court may apply in Item 4 (proposed section 55ZGB(2) of the Bill) where the court is satisfied that the Model Litigant Obligations have been, or are likely to be, contravened, may primarily be costs orders against the Commonwealth litigant (see paragraph 17 of the Explanatory Memorandum). Such sanctions do not sit easily, if at all, with the “costs-free” jurisdiction of the AAT 1 and the AAT 2.

#### **Adverse Costs Orders and Possible Dilution of the Model Litigant Obligations**

37. A prolonged series of adverse orders (particularly costs orders) against the Commonwealth may give rise to policy pressures for the dilution, if not the abandonment, of the Model Litigant Obligations.



38. This risk was considered in *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 1844, where Gray J identified the following policy reason for refusing a costs order against the Commonwealth as a sanction for breach of the Model Litigant Obligations (at [25]):

There were some suggestions in argument that orders for indemnity costs against the ACCC might be appropriate because it had failed in some respects to act in accordance with the model litigant policy of the Commonwealth of Australia. In my view, considerations as to whether there has been compliance with that policy are irrelevant to questions of indemnity costs....To use lapses in compliance with the policy as a ground for awarding indemnity costs against Commonwealth agencies might have the result that the Commonwealth abandoned the policy. This would be detrimental to the public good.

39. Although his Honour was dealing specifically with an application for indemnity costs, the principle remains the same irrespective of whether the potential sanction for breach is an indemnity costs order, a party/party costs order, or some other form of relief adverse to the Commonwealth.

The Department welcomes the opportunity to expand on these submissions, or to provide any additional information the Committee may require.

The contact officer for these submissions is:

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Yours/sincerely

Andrew Wood  
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