

# Chapter 3

## Key issues

3.1 This chapter outlines the key issues raised in evidence to the committee:

- Current compliance with, and oversight of, the model litigant obligation.
- The proposed role for the courts.
- The proposed role for the Ombudsman.
- Possible increases to costs and delays.
- Issues relating to lawyers.
- Other issues.

3.2 The chapter concludes with the committee's view and its recommendations.

### **Current compliance with, and oversight of, the obligation**

3.3 The evidence received by the committee underlined the importance of Commonwealth compliance with the model litigant obligation.<sup>1</sup> As the Attorney-General's Department stated, '[i]t's imperative that the Commonwealth conducts itself in a manner that assists the court and supports access to justice.'<sup>2</sup>

3.4 While the importance of compliance is broadly recognised, the committee received mixed evidence regarding the extent to which Commonwealth litigants actually comply with the obligation and whether existing oversight is adequate.<sup>3</sup> These issues are discussed in turn below.

### ***Current compliance with the obligation***

3.5 The Attorney-General's Department, which administers the obligation, told the committee that it 'does not consider there is any evidence of systemic issues with agency compliance with the model litigant obligation'. It further noted that the Productivity Commission did not suggest there were systemic issues with Commonwealth compliance.<sup>4</sup>

3.6 In the Attorney-General's Department's experience, Commonwealth entities and their legal representatives take the obligation very seriously.<sup>5</sup> This was reflected

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1 See, for example, Department of Human Services, *Submission 1*, p. 3; Law Council of Australia (Law Council), *Submission 11*, p. 5; Rule of Law Institute of Australia (Rule of Law Institute), *Submission 18*, p. 4.

2 Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 35.

3 Also see Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Volume 1, pp. 433–436.

4 Attorney-General's Department, *Submission 10*, p. 6.

5 Attorney-General's Department, *Submission 10*, p. 4.

in submissions from both the Australian Taxation Office (Tax Office) and the Department of Human Services.<sup>6</sup> As the Attorney-General's Department explained:

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.<sup>7</sup>

3.7 The Attorney-General's Department argued that there have been very few confirmed breaches of the obligation compared to the tens of thousands of legal matters involving the Commonwealth and its entities each year.<sup>8</sup>

3.8 As noted in Chapter 1, the OLSC receives notifications regarding possible breaches of the obligation from a number of sources. The following table presents data provided by the Attorney-General's Department which shows:

- the number of notifications the department received about possible non-compliance with the Directions across Commonwealth legal work;
- of the total notifications, the number that related to the obligation; and
- of notifications related to the obligation, the number of confirmed breaches.

**Table 3.1—Compliance data provided by the Attorney-General's Department.<sup>9</sup>**

Year	Notifications relating to the Directions	Notifications relating to the obligation	Confirmed incidences of non-compliance with the obligation
2016–17	77	54	4
2015–16	98	65	11

3.9 The Attorney-General's Department made three observations about the compliance record:

First, in each instance of noncompliance the department was satisfied with the agency's assessment and remedial actions proposed or undertaken by the agencies. Second, within the volume of litigation these figures represent a very low number of noncompliance. Third, many of the complaints of perceived noncompliance do not, in fact, stand up when investigated. People might be unhappy with an outcome, but that does not mean that the Commonwealth has acted improperly. Indeed, the complainant may be

6 Australian Taxation Office (Tax Office), *Submission 3*, p. 4; Department of Human Services, *Submission 1*, p. 3.

7 Attorney-General's Department, *Submission 10*, pp. 4–5.

8 Attorney-General's Department, *Submission 10*, p. 5; also see Tax Office, *Submission 3*, p. 4.

9 Attorney-General's Department, *Submission 10.1*, p. 1.

unhappy with the outcome of their case because the Commonwealth, in fact, acted properly to protect the public interest with respect to that case.<sup>10</sup>

3.10 The department also stated that of confirmed breaches, 'many of them are relatively minor...They're not necessarily all of the worst degrees, but we still record them as being breaches if they don't strictly comply with the obligation.'<sup>11</sup>

3.11 Other government submitters made similar points regarding their respective litigation caseloads. For example, the Department of Home Affairs submitted that it determines the vast majority of allegations that it breached the obligation to be spurious or unsubstantiated.<sup>12</sup> The Tax Office indicated that its records show very few breaches compared to the several thousand litigation matters in which it is involved each year.<sup>13</sup>

3.12 The following table presents data provided by the Tax Office which shows:

- the number of reported breaches of the obligation that were investigated and finalised; and
- of reported breaches, the number of breaches that were confirmed.

**Table 3.2—Reported and confirmed breaches of the model litigant obligation by the Australian Taxation Office.**<sup>14</sup>

Year	Reported breaches of the obligation that were investigated and finalised	Confirmed breaches of the obligation
2016–17	14	2
2015–16	16	7
2014–15	16	8
2013–14	23	3
2012–13	29	2

10 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, pp. 34–35. Note that while Mr Gifford made these comments on 14 June 2018, the Attorney-General's Department corrected its compliance data on 26 October 2018 (see *Submission 10.1*). However, in that correction the department stated that it is satisfied that the updated statistics do not otherwise affect the evidence of departmental officers.

11 Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 32.

12 Department of Home Affairs, *Submission 12*, p. 6.

13 Tax Office, *Submission 3*, p. 4.

14 Tax Office, *Submission 3*, p. 4; also see Mr Jonathan Todd, ATO General Counsel and Mr Grahame Tanna, Assistant Commissioner, Dispute Resolution—Litigation and Technical Leadership, Review and Dispute Resolution, Tax Office, *Committee Hansard*, 26 October 2018, p. 22.

3.13 The Tax Office noted that it generally tries to avoid disputes. However, it was suggested there are three areas of matters to be litigated:

One is where there's an important issue of law to be clarified for the general community. The second is where you've got egregious conduct, where, out of fairness to all other taxpayers, we have to ensure that we take that conduct on. The third is where you have the intractable dispute where someone wants a deduction for their bedsocks or something, where, out of fairness, again, to all other taxpayers, we can't let that one go.<sup>15</sup>

3.14 In addition to data provided by government departments, which conduct the litigation, the committee received data from agencies that handle complaints: the Commonwealth Ombudsman and the Inspector-General of Taxation.

3.15 The Ombudsman told the committee that his office does not classify complaints according to whether or not the complaint relates to model litigant obligations. Nonetheless, the Ombudsman estimated that his office receives 'a very small number' of complaints relating to the obligation—that is, 'in the order of three, four or five a year'.<sup>16</sup>

3.16 The Inspector-General of Taxation told the committee that he has been responsible for complaints regarding the administrative actions of the Tax Office and the Tax Practitioners Board since 1 May 2015. In that time, his office has received over 7,000 complaints and, based on the office's experience, complaints about tax administration 'often include' dissatisfaction with litigation conduct and model litigant obligation matters.<sup>17</sup>

3.17 Aside from data provided by government agencies, a number of individuals and organisations also provided evidence regarding breaches of the obligation. This evidence generally indicated that non-compliance is more common than official data suggest.

3.18 For example, Civil Liberties Australia submitted that the government has a 'reputation among small law firms and court-aware members of the public as a bully in litigation'.<sup>18</sup> The Chief Executive Officer of Civil Liberties Australia, Mr William Rowlings, referred to breaches of the obligation and suggested that 'there are hundreds, probably thousands, maybe tens of thousands over the past 10 years—certainly thousands'.<sup>19</sup>

3.19 Some submitters singled out the compliance record of particular government agencies. For example, Cleary Hoare Solicitors submitted that its experience with the

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15 Mr Tanna, Tax Office, *Committee Hansard*, 26 October 2018, p. 23.

16 Mr Manthorpe, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman (Commonwealth Ombudsman), *Committee Hansard*, 14 June 2018, p. 44.

17 Office of the Inspector General of Taxation, *Submission 26*, p. 1.

18 Civil Liberties Australia, *Submission 15*, p. 3.

19 Mr William Rowlings, Chief Executive Officer, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

Tax Office and the Australian Government Solicitor has shown that 'both entities often fall short of complying with Model Litigant Obligations...throughout the dispute resolution process.'<sup>20</sup>

3.20 Self-Employed Australia also took issue with the Tax Office, arguing that it 'almost routinely' breaches the obligation in relation to small business people. The Executive Director of Self-Employed Australia, Mr Ken Phillips, argued that the Tax Office 'certainly play every legal game that they can. Every technical trick that might be available is played. Every delay, every appeal—everything that you can possibly do.'<sup>21</sup>

3.21 The Australian Lawyers Alliance (Lawyers Alliance) referred to the example of Comcare. It claimed that its members have found that Comcare rarely implements the model litigant obligation and have seen examples of an 'increasingly aggressive approach to retrieve compensation'.<sup>22</sup> Further, the National Spokesperson for the Lawyers Alliance, Dr Andrew Morrison RFD SC, told the committee (speaking generally, not specifically in relation to Comcare):

I can recall, for example, one case where I lodged a complaint in respect of the model litigant rules. After the case was over, I received an expression of regret, which didn't assist at all because the case was concluded by then.<sup>23</sup>

3.22 A number of individual submitters also detailed for the committee their personal experience of alleged breaches.<sup>24</sup> For instance, Mr Roderick Douglass told the committee that the Tax Office accused him of fraud, causing him to accrue legal costs and 'six to nine months of stress'. Mr Douglass said that when the matter went to court, the Tax Office stated that it had made a mistake and withdrew.<sup>25</sup>

3.23 Mr Kia Silverbrook alleged that, in a case concerning his business, the Office of the Fair Work Ombudsman 'specifically and consciously ignored its obligations as a model litigant, even when these obligations were pointed out to it many times'.<sup>26</sup>

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20 Cleary Hoare Solicitors, *Submission 8*, p. 1.

21 Mr Ken Phillips, Executive Director, Self-Employed Australia, *Committee Hansard*, 14 June 2018, p. 8.

22 Australian Lawyers Alliance, *Submission 6*, p. 4.

23 Dr Andrew Morrison RFD SC, National Spokesperson, Australian Lawyers Alliance, *Committee Hansard*, 14 June 2018, p. 20.

24 See, for example, Ms Mona Krombholz, *Submission 13*; Blackwater Treatment Systems, *Submission 20*; Ms Helen Petaia, *Submission 21*; Mr Keith Owen, *Submission 27*; Ms Joanne Hambrook, *Submission 29*; Mr Michael Shord, Private capacity, *Committee Hansard*, 26 October 2018, pp. 10–15.

25 Mr Roderick Douglass, Private capacity, *Committee Hansard*, 26 October 2018, pp. 1–2.

26 Mr Kia Silverbrook, *Submission 14*, p. 1; also see Office of the Fair Work Ombudsman, response to Mr Silverbrook, *Submission 14*.

3.24 In addition to these allegations of non-compliance, some inquiry participants suggested that the Attorney-General's Department's compliance data may not be entirely reliable.

3.25 Civil Liberties Australia, for example, claimed that the OLSC has insufficiently monitored compliance with the obligation.<sup>27</sup> It argued that the OLSC relies on agencies to report when they have breached the obligation, and that this kind of self-reporting is unreliable.<sup>28</sup>

3.26 While the Directions require Commonwealth entities to advise counsel about the obligation,<sup>29</sup> the Attorney-General's Department confirmed that the Directions do not require Commonwealth entities to advise private litigants about the existence of the obligation.<sup>30</sup> It is plausible, then, that some private litigants are not aware of the obligation or, for that matter, the option of complaining to the OLSC about alleged breaches of the obligation.

3.27 It was put to the Attorney-General's Department that the figures it provided indicate a 'remarkably small amount' of non-compliance.<sup>31</sup> In response, the department posited that by engaging with Commonwealth litigants throughout the process, it prevents the occurrence of breaches and complaints:

[T]he complaints are realistically just the tip of the iceberg in terms of our compliance work. Because we are engaging so early and so often with agencies in their conduct of litigation—and I gave an example earlier about some of the forums—it means that we can be engaged throughout their decision-making process, including suggesting to them that they might want to think about how they are proposing to conduct the litigation. So I would say to you that our compliance work includes prevention of further complaints and that the statistics then are not necessarily representative of the totality of where amendments might be needed for the conduct of the agencies.<sup>32</sup>

3.28 It should be noted that a number of the above examples, which allege breaches of the obligation, were directly disputed by the government agency that was

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27 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 11; also see Civil Liberties Australia, *Submission 15*, p. 3.

28 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

29 Paragraph 6.2, Legal Services Directions 2017.

30 Attorney-General's Department, answers to questions on notice, 14 June 2018 (received 20 June 2018), p. 2.

31 Senator David Leyonhjelm, *Committee Hansard*, 14 June 2018, p. 37.

32 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, pp. 37–38;

the subject of adverse reflections. These responses were published alongside the submissions or were contained in Hansard transcripts.<sup>33</sup>

### ***Adequacy of oversight by the Office of Legal Services Coordination***

3.29 As explained in Chapter 1, the Attorney-General's Department, through the OLSC, is responsible for administering the Directions.

3.30 The existing system of oversight received support from some submitters, including the Attorney-General's Department and the Tax Office.<sup>34</sup> The Department of Human Services also submitted that 'the current system of review and enforcement...is appropriate and effective'.<sup>35</sup>

3.31 The Department of Human Services further noted that as the Directions are made by the Attorney-General, the 'OLSC is best-placed to interpret the intentions of the Commonwealth's first law officer in respect of the content of the Directions'.<sup>36</sup> Similarly, the Law Council of Australia (Law Council) submitted that OLSC 'is arguably better placed to deal with systemic issues that might arise than the Commonwealth Ombudsman'.<sup>37</sup>

3.32 The Attorney-General's Department rejected claims made in evidence that it is too passive in its oversight of the obligation.<sup>38</sup> It argued that the OLSC is 'quite proactive' and 'does not simply wait passively until a matter has concluded and then review its handling'.<sup>39</sup> For example, if a Commonwealth agency is seeking legal counsel that costs more than \$5,000 then the Attorney-General's approval is required. The department explained that in such cases, the OLSC gets involved early. The OLSC would:

...be part of that conversation to say, 'What do you need this particular counsel for, how many counsel and what's the particular purpose?' Part of that conversation is: 'Have you got the right, and only the right, amount of resources devoted to this particular exercise?' It's not just that we wait until the other end of the exercise, where there's a complaint about a potential

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33 See, for example, Response by the Department of Defence to Ms Mona Krombholz, *Submission 13*; Response by the Fair Work Ombudsman to Mr Silverbrook, *Submission 14*; Response by the Department of Human Services to Mr Keith Owen, *Submission 27*; Responses by the Tax Office to Self-Employed Australia, *Submission 19*, to Blackwater Treatment Systems, *Submission 20*, to Ms Helen Petaia, *Submission 21*, to Mr Michael Shord, *Submission 25*, to Mr Keith Owen, *Submission 27*, and to Ms Joanne Hambrook, *Submission 29*; Mr Tanna and Mr Todd, Tax Office, *Committee Hansard*, 26 October 2018, pp. 16–27.

34 Attorney-General's Department, *Submission 10*, p. 11; Tax Office, *Submission 3*, p. 7.

35 Department of Human Services, *Submission 1*, p. 3.

36 Department of Human Services, *Submission 1*, p. 4.

37 Law Council of Australia (Law Council), *Submission 11*, p. 9.

38 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 36.

39 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 35 and p. 36.

breach of the model litigant obligation but that we're very much involved at the outset of litigation as well.<sup>40</sup>

3.33 However, other submitters questioned the adequacy of oversight arrangements. For instance, the Lawyers Alliance referred to alleged breaches of the obligation and argued that '[t]here is a clear need for greater oversight of government agencies' implementation of model litigant obligations'.<sup>41</sup>

3.34 Mr Charles Powers argued that some government agencies have shown a 'willingness to bend the existing rules to minimise scrutiny', and supported clear reporting requirements.<sup>42</sup>

3.35 Civil Liberties Australia argued that the obligation should be actively policed, and that this has not occurred for more than a decade.<sup>43</sup> It stated that 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.'<sup>44</sup> Civil Liberties Australia also argued that the Attorney-General's Department 'takes an extraordinarily passive' approach to the education of government agencies about the obligation.<sup>45</sup>

3.36 Moreover, at the time of its submission, Civil Liberties Australia said that it appears that the Attorney-General's Department does not publish reported breaches of the obligation in accordance with its own guidance note, arguing that this 'would appear to illustrate a contempt' with which the Attorney-General's Department treats the model litigant obligation.<sup>46</sup> It supported an audit of Commonwealth compliance with the obligation, while suggesting that AGD should not be responsible for it because '[w]e don't believe they can be trusted on this'.<sup>47</sup>

3.37 In responding to Civil Liberties Australia's submission, the Attorney-General's Department stated:

The department does publish statistical information from agency compliance assessments undertaken in accordance with the Directions. This information has been published annually in the department's annual reports and/or the department's website. We acknowledge that the Guidance Note

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40 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 36.

41 Australian Lawyers Alliance, *Submission 6*, p. 4.

42 Mr Charles Powers, *Submission 7*, p. 2.

43 Civil Liberties Australia, *Submission 15*, p. 3.

44 Civil Liberties Australia, *Submission 15*, p. 3; also see Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

45 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

46 Civil Liberties Australia, *Submission 15*, pp. 1–2; also see Response by the Attorney-General's Department to Civil Liberties Australia, *Submission 15*.

47 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10 and p. 11.



on our website requires updating and will seek [to] make the required amendments.<sup>48</sup>

### **The proposed role of the courts**

3.38 The committee heard mixed evidence on the merit of the bill's provisions regarding court powers. One key issue was whether courts already have sufficient powers to maintain standards of conduct in litigation, including by enforcing the common law obligation and court rules, and whether this renders the bill unnecessary.

3.39 Mr Silverbrook, who supported the bill, suggested that existing provisions governing compliance with the Directions provide 'loopholes' to Commonwealth litigants. He noted that under existing subsections 55ZG(2) and 55ZG(3) of the Judiciary Act, the model litigant obligations 'are not enforceable and cannot be raised in court, except by the Commonwealth Government itself.'<sup>49</sup>

3.40 Dr Morrison RFD SC of the Lawyers Alliance discussed possible limitations of relying on existing enforcement options:

If the behaviour is behaviour which falls short of a breach of court rules, or court orders, but which is nonetheless designed to delay or make more difficult the tasks of bringing a case to fruition, then it may be that the new rules will then have some useful affect in permitting a court to enforce that which previously the court wouldn't wish to become involved in, so I see an advantage in that respect.<sup>50</sup>

3.41 The Queensland Law Society supported the concept of enforceable model litigant obligations, including the court having discretion to stay proceedings or make orders if a Commonwealth litigant contravenes the obligation. However, it argued that '[w]e do not consider that it is appropriate to seek an order of the court based on a "likely" contravention of a provision', which is currently allowed for under the bill, as 'it creates a significant degree of uncertainty'.<sup>51</sup> The Queensland Law Society proposed an amendment to this effect.<sup>52</sup>

3.42 The Rule of Law Institute of Australia (Rule of Law Institute) supported the bill's proposed enforcement of the model litigant obligation.<sup>53</sup> Mr Malcolm Stewart, the Institute's Vice-Chairman, posited that currently, a court:

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48 Response by the Attorney-General's Department to Civil Liberties Australia, *Submission 15*, p. 1.

49 Mr Silverbrook, *Submission 14*, p. 1, p. 3.

50 Dr Morrison RFD SC, Australian Lawyers Alliance, *Committee Hansard*, 14 June 2018, p. 23; also see Mr Malcolm Stewart, Vice-Chairman, Rule of Law Institute of Australia (Rule of Law Institute), *Committee Hansard*, 14 June 2018, pp. 16–17.

51 Mr Ken Taylor, President, Queensland Law Society, *Committee Hansard*, 14 June 2018, p. 24; also see proposed subsection 55ZGA(1), proposed paragraph 55ZGB(1)(a), and proposed subsection 55ZGB(2) of the Judiciary Act in the bill.

52 Queensland Law Society, *Submission 5*, pp. 1–2.

53 Rule of Law Institute, *Submission 18*, p. 8.

...has a lot of powers under the Federal Court rules, and the act, to stay proceedings for various reasons. It does not have the power to stay the proceedings for breach of the model litigant obligations. What this bill does is introduce the ability to stay.<sup>54</sup>

3.43 In practice, Mr Stewart argued that 'Federal Court judges would be loath to grant a stay', given other requirements to conduct litigation speedily and efficiently.<sup>55</sup> He said:

...I think it is only in extreme circumstances that a court would grant a stay. At least initially, it is much more likely to try and redress in some specific way the breach of the obligations of the model litigant rules should the bill be passed. Only after that, if that wasn't remedied at that point, would you expect the court to grant a stay in these proceedings.<sup>56</sup>

3.44 Another submitter, whose name was withheld, also noted that courts are reluctant to stay proceedings, observing 'the courts' drive for procedural efficiency'. However, this submitter suggested that this reluctance would negatively affect the bill's intended operation.<sup>57</sup>

3.45 A number of submitters told the committee that a court is already able to stay proceedings and make orders under the current system.<sup>58</sup> The Legal Services Commission of South Australia referred to the court's powers in enforcing the common law obligation, which exists in addition to the obligation in the Directions:

The Common Law has a long-established principle that the Crown must comply with certain standards in the way it conducts litigation. Where those standards are not adhered to, courts may look to remedies such as granting adjournments, interlocutory proceedings, costs orders or allowing additional witnesses to be called.<sup>59</sup>

3.46 Both the Commonwealth Ombudsman and the Law Council referred to examples in which courts have exercised their powers, or considered the potential to exercise them, with respect to the common law obligation.<sup>60</sup> The Law Council's examples included courts making a special cost order for breaching the obligation, potentially staying proceedings until a breach of the duty is remedied, and taking into account a breach of the obligation in exercising judicial discretion.<sup>61</sup>

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54 Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 16.

55 Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 16.

56 Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 17.

57 Name withheld, *Submission 23*, p. 1.

58 See, for example, Commonwealth Ombudsman, *Submission 4*, pp. 2–3; Attorney-General's Department, *Submission 10*, p. 4; Law Council, *Submission 11*, pp. 7–8.

59 Legal Services Commission of South Australia, *Submission 2*, p. 1; also see, for example, Department of Human Services, *Submission 1*, p. 4; Tax Office, *Submission 3*, p. 6.

60 Commonwealth Ombudsman, *Submission 4*, p. 3; Law Council, *Submission 11*, p. 8.

61 Law Council, *Submission 11*, p. 8.

3.47 Moreover, the Law Council submitted that 'the model litigant principles set out in the Legal Services Directions are not in substance different to the common law duty'. It also referred to a Federal Court judgement in which the common law obligation was said to be 'broader and more fundamental'.<sup>62</sup>

3.48 The Commonwealth Ombudsman similarly submitted that there is 'a significant overlap between the administrative and common law model litigant obligation'. It referred to the Federal Court decision of *ASIC v Rich*, which held that the obligation in the Directions can be used as an aid to understanding the content of the common law obligation.<sup>63</sup>

3.49 In addition to the common law obligation, the Attorney-General's Department submitted that 'the courts use their inherent jurisdiction and civil procedure laws to oversee the Commonwealth's actions as a litigant.' It gave the example of subsections 37M and 37N of the *Federal Court of Australia Act 1976*, which oblige litigants to ensure that litigation is conducted in a proper and efficient way.<sup>64</sup>

3.50 The Law Council also observed that a court would also have regard to the Federal Court Rules 2011 when considering whether a contravention of the obligation would cause, or would likely cause, the administration of justice to be compromised.<sup>65</sup>

3.51 Given these existing powers, the Law Council argued that proposed sections 55ZGA and 55ZGB of the Judiciary Act in the bill would not, 'as a matter of substance, provide any additional power to a Court that does not already exist by reason of the common law and the Rules of the Court'.<sup>66</sup> The Law Council further stated:

In fact, it might be argued that the proposed statutory provisions detract from that common law power by conditioning the grant of any relief to circumstances where a complaint has been made to the Ombudsman.<sup>67</sup>

3.52 A similar but distinct point was made by the Tax Office, which suggested that the bill could be considered a fetter on the court's inherent jurisdiction if it requires the court to consider the investigation and decision of the Ombudsman prior to making an order.<sup>68</sup>

3.53 The Tax Office also expressed concern that the bill would conflate 'the determination of whether conduct is a breach of the model litigant obligations with the determination of the substantive issue' before the court.<sup>69</sup> It told the committee that

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62 *Qantas Airway Ltd v Transport Workers Union of Australia* [2011] FCA 470 at [192]; Law Council, *Submission 11*, p. 8.

63 *ASIC v Rich* (2009) 236 FLR 1; Commonwealth Ombudsman, *Submission 4*, p. 2.

64 Attorney-General's Department, *Submission 10*, p. 6.

65 Law Council, *Submission 11*, p. 8.

66 Law Council, *Submission 11*, p. 8.

67 Law Council, *Submission 11*, p. 8.

68 Tax Office, *Submission 3*, p. 6.

69 Mr Tanna, Tax Office, *Committee Hansard*, 26 October 2018, p. 17.

courts can already take action regarding any matter which goes to the substantive matter before the court, including breaches of the obligation:

[I]f something has been done that's unlawful or a breach of the rules, then you would raise it with the court because, if it's relevant to the substantive matter, you don't need the process of going to the Ombudsman. You would raise it with the court because it's relevant to the determination of the issue.<sup>70</sup>

3.54 The Tax Office further illustrated this point with an example:

[T]he small-business person says, 'Oh, I want a deduction for whatever.' And surely whether the Commonwealth has been in breach of the model litigant obligations is not relevant to determining whether they get the deduction. If the Commonwealth is in breach of a model litigant obligation then that doesn't mean that they get the deduction. It may be relevant in the proceedings, in the production of documents, or in some other procedural aspect that's relevant to the proceedings. If that's the case, the court already has that jurisdiction.<sup>71</sup>

3.55 In a similar vein, the Attorney-General's Department suggested that courts can handle matters that go to the substance of the litigation, while other conduct can be handled by the current administrative process:

We would argue that, to the extent that anything is raised before the court which goes to the substance of the way that the litigation is being conducted, the court has sufficient inherent jurisdiction to deal with it. To the extent that it's outside of the way the conduct is being managed for the purposes of the current dispute—and it goes to something about the conduct of the Commonwealth, which does not substantively impact on the litigation—then the current framework, in terms of a complaint to the Office of Legal Services Coordination and engagement with the relevant agency, is sufficient to address that.<sup>72</sup>

### ***Applying the proposed powers to tribunals***

3.56 The Directions provide that the model litigant obligation applies to litigation, including before courts, tribunals, inquiries, and in arbitration or other alternative dispute resolution processes.<sup>73</sup> However, the bill only refers to courts; it does not mention tribunals.

3.57 Some submitters observed that it is not clear whether the bill, as currently drafted, applies to tribunals.<sup>74</sup> Others appeared to presume that it either does<sup>75</sup> or does not<sup>76</sup> include tribunals.

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70 Mr Tanna, Tax Office, *Committee Hansard*, 14 June 2018, p. 27.

71 Mr Tanna, Tax Office, *Committee Hansard*, 26 October 2018, p. 17.

72 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 42.

73 Legal Services Directions 2017, Appendix B, Note 1.

74 See, for example, Department of Human Services, *Submission 1*, p. 8.

3.58 At one of the committee's hearings, Senator Leyonhjelm provided some context as to why the bill only refers to courts and not tribunals:

My thinking was that the Commonwealth party to litigation would never know when a case was going to go all the way through to the Federal Court, even having been dealt with by the AAT before that, and therefore that knowledge that their behaviour, their compliance with model litigant rules, might be raised in a court would influence the way they dealt with a case up to that point.<sup>77</sup>

3.59 The Department of Human Services highlighted possible issues with the bill applying to tribunals. First, it noted that it is not clear whether the current bill would apply to tribunals:

[T]he 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.<sup>78</sup>

3.60 Moreover, the department said that applying sanctions for non-compliance, as proposed by the bill, is unlikely to accord with the no-cost jurisdictions of the AAT 1 and AAT 2:

[T]he 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.<sup>79</sup>

3.61 Nevertheless, several witnesses expressed at least some level of support for the provisions of the bill applying to tribunals as well as courts.<sup>80</sup> This included Self-Employed Australia, which supported including the AAT in the bill as it is often the "first port of call" for an independent review of the ATO's actions against a small businessperson'.<sup>81</sup>

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75 See, for example, Cleary Hoare Solicitors, *Submission 8*, pp. 3–4; Law Council, *Submission 11*, p. 5.

76 See, for example, Tax Office, *Submission 3*, p. 9; Self-Employed Australia, *Submission 19*, p. 3.

77 Senator Leyonhjelm, *Committee Hansard*, 14 June 2018, p. 22.

78 Department of Human Services, *Submission 1*, p. 8.

79 Department of Human Services, *Submission 1*, p. 8.

80 See, for example, Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 18; Mr Taylor, Queensland Law Society, *Committee Hansard*, 14 June 2018, p. 22; Dr Morrison RFD SC, Australian Lawyers Alliance, *Committee Hansard*, 14 June 2018, p. 22.

81 Self-Employed Australia, *Submission 19*, p. 3.

3.62 While both the Tax Office and the Attorney-General's Department generally opposed the bill, they each also expressed concern about the bill applying only to courts and not tribunals.

3.63 The Tax Office cautioned that this may lead to taxpayers commencing proceedings in the Federal Court, rather than the AAT, because they perceive that would provide an advantage:

With regards to taxation and superannuation litigation, this may create access to justice and equity issues as taxpayers of more substantial means who can afford to litigate within the Federal Court could in effect achieve a different outcome than if they had undertaken the litigation within the Administrative Appeals Tribunal.<sup>82</sup>

3.64 The Attorney-General's Department suggested that limiting the bill's application to courts and excluding tribunals would 'fragment its operation, cause inconsistencies and not be in line with the intended objectives of the model litigant obligation'.<sup>83</sup>

### **The proposed role of the Commonwealth Ombudsman**

3.65 The bill's proposed role for the Ombudsman received support from some submitters. For example, the Rule of Law Institute highlighted that the Productivity Commission recommended establishing a formal avenue of complaint to a government ombudsman.<sup>84</sup> Civil Liberties Australia stated that the bill would ensure that 'a proper authority, the Commonwealth Ombudsman, would take the [model litigant obligation] on the government seriously, and would report annually'.<sup>85</sup>

3.66 Cleary Hoare Solicitors, which supported the bill, submitted that the Ombudsman should be able to make recommendations to the court regarding appropriate sanctions, not merely determine whether the obligation was breached.<sup>86</sup> It also observed that elements of the obligation apply to conduct prior to the commencement of court proceedings. If the obligation can only be enforced by a court, then this:

...requires the Commonwealth subject to commence proceedings despite a potential contravention of [the model litigant obligation]. It surely cannot be the intention of the Bill to require this.

We recommend a suitable alternative to empower the Ombudsman and/or [the Inspector-General of Taxation] to suspend any action by the

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82 Tax Office, *Submission 3*, p. 9.

83 Attorney-General's Department, *Submission 10*, p. 9.

84 Rule of Law Institute, *Submission 18*, p. 7.

85 Civil Liberties Australia, *Submission 15*, p. 2; also see, for example, Queensland Law Society, *Submission 5*, p. 1.

86 Cleary Hoare Solicitors, *Submission 8*, p. 4.

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Commonwealth entity in respect of the dispute until the contravention has been investigated and remedied.<sup>87</sup>

3.67 The Law Council's view was different; it suggested that while the Ombudsman should have some administrative role, a court is better placed to consider and adjudicate on alleged breaches of the obligation in the particular circumstances of a matter before the court.<sup>88</sup> It submitted:

In a general sense, a breach of those elements of the model litigant obligations that are of an administrative nature are appropriately matters for administrative complaint and review mechanisms. On the other hand, those elements that relate to the way litigation is to be conducted in court are matters for the court in the exercise of its inherent powers to manage the conduct of judicial proceedings and to exercise supervision over the adherence by legal practitioners with their ethical and other professional obligations as legal practitioners and officers of the court.<sup>89</sup>

3.68 The Attorney-General's Department argued that the bill is unnecessary, in part because it is already possible to complain to the Ombudsman about alleged breaches of the obligation.<sup>90</sup> As noted in Chapter 1, the Ombudsman submitted that it is currently able to consider complaints regarding breaches of the obligation.<sup>91</sup> However, the Ombudsman generally refers any complaints to the OLSC,<sup>92</sup> and does not typically involve itself in matters that are before a court.<sup>93</sup>

3.69 The Ombudsman further noted that in order to effectively perform the function proposed in the bill, it would need to build the skills of its office and engage specially trained investigation officers who understand litigation. This would require appropriate resources.<sup>94</sup> However, the volume of resources needed would depend on the quantity and complexity of complaints received regarding the obligation.<sup>95</sup> The Ombudsman also discussed the powers available to the office when conducting investigations.<sup>96</sup>

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87 Cleary Hoare Solicitors, *Submission 8*, p. 2.

88 Law Council, *Submission 11*, p. 9.

89 Law Council, *Submission 11*, p. 7.

90 Attorney-General's Department, *Submission 10*, p. 6.

91 Commonwealth Ombudsman, *Submission 4*, pp. 3–4.

92 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 14 June 2018, p. 44.

93 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 14 June 2018, p. 46.

94 Commonwealth Ombudsman, *Submission 4*, pp. 4–5.

95 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 14 June 2018, p. 43.

96 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 26 October 2018, p. 8.

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***Possible procedural issues with an Ombudsman investigation***

3.70 Some submitters raised questions about how investigations by the Ombudsman would relate to court processes if the bill were passed.<sup>97</sup>

3.71 The Ombudsman advised that it is not clear how the proposed scheme would interact with existing subsections 6(2) and 6(3) of the Ombudsman Act. In very general terms, these provisions limit (but do not eliminate) the Ombudsman's ability to investigate matters that are before a court, that may go before a court, or that have been before a court.

3.72 The Ombudsman posited that 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)'. It also stated that subsection 6(2) avoids duplication of oversight of an agency by the Ombudsman and a court.<sup>98</sup>

3.73 Some inquiry participants also expressed concerns about inadvertent interference with court procedures. The Legal Services Commission of South Australia submitted that '[i]t is easy to imagine that any investigation of an active court case would quickly fall foul of the laws of evidence and contempt'.<sup>99</sup> Similarly, the Ombudsman stated that '[i]n 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.'<sup>100</sup>

3.74 The Law Council suggested that an Ombudsman investigation could interfere with the administration of justice by a court:

For example, there is an implied undertaking by a party to litigation to only use material obtained through compulsory judicial processes for the purposes of that litigation; that is, without a release from that undertaking from the Court, use of that material in an Ombudsman enquiry would likely amount to an abuse of process.<sup>101</sup>

3.75 The Law Council also raised the possibility that the Ombudsman's report 'might prejudice the Commonwealth's substantive position in the litigation by revealing, for example, matters of legitimate litigation strategy that the Commonwealth should be entitled to keep confidential'.<sup>102</sup>

3.76 The Attorney-General's Department highlighted section 11A of the Ombudsman Act, which enables the Federal Court to make a determination on how

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97 See, for example, Tax Office, *Submission 3*, pp.5–6; Attorney-General's Department, *Submission 10*, p. 9.

98 Commonwealth Ombudsman, *Submission 4*, p. 4.

99 Legal Services Commission of South Australia, *Submission 2*, p. 1.

100 Commonwealth Ombudsman, *Submission 4*, p. 5.

101 Law Council, *Submission 11*, p. 9.

102 Law Council, *Submission 11*, p. 9.



the Ombudsman conducted or is conducting its investigation. It observed that, as the bill would allow the Ombudsman to investigate conduct before a court, it 'could result in one part of the Federal Court directly or indirectly commenting on proceedings in another part of the Federal Court'.<sup>103</sup>

3.77 Finally, regarding the scope of the Ombudsman's investigations, both the Tax Office and the Attorney-General's Department submitted that the bill is not clear on whether the Ombudsman would have jurisdiction to investigate complaints about a Commonwealth litigant's conduct in state or territory court systems.<sup>104</sup>

### ***Interaction between the Ombudsman and the court***

3.78 A further issue related to questions about the status that an investigation by the Ombudsman would hold before a court. For instance, the Attorney-General's Department stated that there is a 'lack of clarity' regarding what would happen when the Ombudsman reports to the court:

The court has the ability under the bill to make an order, but what if the court says, 'Okay, we need more information from the Ombudsman?' What if the court doesn't agree with the Ombudsman's findings?<sup>105</sup>

3.79 The department also made further observations:

We see the potential there for a matter to be raised with a court and referred off to the Ombudsman for investigation. But then it also remains within the court's jurisdiction, as we understand it, to make a decision without waiting for the Ombudsman's outcome. Alternatively, they might actually await a report from the Ombudsman. There is a potential there for the Ombudsman to conclude that it either is or isn't a breach of the model litigant obligation and for a court to conclude otherwise. How those two can be reconciled is actually a little unclear for us.<sup>106</sup>

3.80 In a similar vein, the Tax Office asked:

...does the Court need to consider the investigation and decision made by the Commonwealth Ombudsman prior to making an order? If this is the case, then it could be considered a fetter on the court's inherent jurisdiction for it to have to consider the decision of an administrative body such as the Ombudsman. If this is not the case, then the obvious question remains – what is the utility and value to be gained by the Commonwealth Ombudsman becoming involved in investigating contraventions of model litigant obligations?<sup>107</sup>

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103 Attorney-General's Department, *Submission 10*, p. 9.

104 Tax Office, *Submission 3*, p. 6; Attorney-General's Department, *Submission 10*, p. 9.

105 Mr Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 29.

106 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 39.

107 Tax Office, *Submission 3*, pp. 5–6.

3.81 One submitter told the committee that the proposed court powers are too broad because they would enable courts to make orders even where the Ombudsman did not find that the Commonwealth breached the obligation.<sup>108</sup>

3.82 The Ombudsman observed that only a court, not the Ombudsman, could enforce the obligation. As a result, the referral of complaints to the Ombudsman may 'remove a litigant's recourse to enforce the obligation through court processes and replace it with an administrative complaint process conducted by [the Ombudsman's Office].'<sup>109</sup>

3.83 Alternatively, if this is not the case, then there is a 'very real possibility' that the Ombudsman and the court would come to different views about an alleged breach, particularly since the obligation can be complex and 'pulls in different directions'. The Ombudsman said that in these cases, litigants would be 'obliged to adhere to any orders made by the court and it is unclear what status the investigation by [the Ombudsman] would have'.<sup>110</sup> The Ombudsman raised the possibility that this might result in his office, the court, and lawyers expending resources on an investigation that doesn't have clear results.<sup>111</sup>

3.84 Notwithstanding these points, some submitters supported employing the Ombudsman as a means of resolving compliance matters quickly and outside the courts.<sup>112</sup>

3.85 The Queensland Law Society submitted that a litigant should not be required to make a complaint to the Ombudsman in order to be able to raise in court a Commonwealth litigant's compliance with the obligation.<sup>113</sup> As Mr Taylor of the Queensland Law Society stated:

The complaint process should run parallel to the litigation, be dealt with at the same time and be dealt with basically on the side by the Ombudsman, who can then make their findings known to the parties. If the parties wish to bring those findings to the court, the court can make the decision then as to whether or not a penalty should be applied, whether that be a monetary penalty or in fact a stay of proceedings or some other decision.<sup>114</sup>

3.86 The Lawyers Alliance made a similar point. It recommended that the Ombudsman's oversight 'be available in real time, offering the prospect of enforcing

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108 Name withheld, *Submission 23*, p. 1.

109 Commonwealth Ombudsman, *Submission 4*, p. 3.

110 Commonwealth Ombudsman, *Submission 4*, p. 3.

111 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 14 June 2018, p. 46; also see Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 26 October 2018, p. 6.

112 Also see, for example, Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 16.

113 Ms Kate Brodnik, Senior Policy Solicitor, Queensland Law Society, *Committee Hansard*, 14 June 2018, p. 22.

114 Mr Taylor, Queensland Law Society, *Committee Hansard*, 14 June 2018, p. 21.

model litigant obligations while the dispute is still ongoing.<sup>115</sup> Dr Morrison RFD SC of the Lawyers Alliance stated that matters should go to the Ombudsman first 'in 99.9 per cent of cases', rather than a judge:

I think the primary focus should be on the Ombudsman remedy, because that is the quickest and most practical remedy and one which doesn't drag a judge away from the judge's primary function of determining the facts in the case and applying the law...<sup>116</sup>

3.87 However, Dr Morrison RFD SC noted that there may be some very rare cases in which a judge would need to be involved, such as 'upon clear findings by the Ombudsman that something improper had occurred, and then the judge may need to take that into account in assessing what, if any, procedural remedies were required'.<sup>117</sup> However, he also noted that:

I wouldn't like to see a situation where the judge is the first port of call, because our judges do their very best to keep focused upon what's in the particular case and where the evidence leads them—and that's properly so, in the interests of justice.<sup>118</sup>

3.88 One submitter expressed greater concern on this point, observing that the bill requires the trial judge to also hear an application to stay proceedings. They pointed to the risk of apprehended bias:

A finding by the trial judge that the Commonwealth has breached their model litigant obligations may mean that the trial judge is perceived as "biased". This would have further appellate implications. This should be amended.<sup>119</sup>

### ***Interaction between the Ombudsman and the Inspector-General of Taxation***

3.89 The Inspector-General of Taxation drew attention to possible issues relating to the jurisdictional boundary between the Commonwealth Ombudsman and the Inspector-General.

3.90 The Inspector-General is responsible for the handling of all complaints regarding the administrative actions of the Tax Office and the Tax Practitioners Board.<sup>120</sup> The Ombudsman is responsible for complaints relating to administration in other areas of government. On this issue, the Inspector-General submitted:

If the Commonwealth Ombudsman was to be the sole repository of complaints on the [model litigant obligation], as is currently provided for in the bill, it would require both of our offices to expend time and effort to determine the parameters of our respective jurisdictions, transfer parts of

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115 Australian Lawyers Alliance, *Submission 6*, p. 7.

116 Dr Morrison RFD SC, Australian Lawyers Alliance, *Committee Hansard*, 14 June 2018, p. 23.

117 Dr Morrison RFD SC, Australian Lawyers Alliance, *Committee Hansard*, 14 June 2018, p. 22.

118 Dr Morrison RFD SC, Australian Lawyers Alliance, *Committee Hansard*, 14 June 2018, p. 22.

119 Name withheld, *Submission 23*, p. 1.

120 Office of the Inspector-General of Taxation, *Submission 26*, p. 1.

complaints and be restricted in sharing information or findings due to the secrecy obligations set out in our respective legislation. Such an outcome would likely delay resolution of complaints investigations, increase costs for all parties and potentially hamper the efficient administration of justice.

Accordingly, we believe that if the bill was to be passed, consequential amendments should be made to the *Inspector-General of Taxation Act 2003* to incorporate any powers of the Ombudsman to investigate [model litigant obligation] matters in relation to the actions of the [Tax Office] and the [Tax Practitioners Board].<sup>121</sup>

3.91 When invited to comment on this, the Ombudsman, Mr Manthorpe, told the committee that he agrees with the Inspector-General's proposition that:

...if [the Office of the Commonwealth Ombudsman] had the power to look at whether the model litigant provisions had been appropriately dealt with in a tax matter, but [the Inspector-General of Taxation] still had complaint-handling powers about tax matters, which he currently does, then that could get messy. It would be better to have both things sitting with him with respect to tax matters.<sup>122</sup>

3.92 However, the Ombudsman also acknowledged that jurisdictional issues sometimes arise in the current system, for example, a matter may touch on tax matters as well as veterans' entitlement matters. The Ombudsman's office is 'accustomed to working with that sort of ambiguity with all the other agencies'.<sup>123</sup>

### **Possible increases to costs and delays**

3.93 As outlined in Chapter 2, the government's response to the Productivity Commission's report stated that compliance with the obligation is a matter between the Attorney-General and the relevant Commonwealth agency or department. Any other approach, according to the government response, 'could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth'.<sup>124</sup>

3.94 The committee heard further evidence on this issue during its inquiry.

3.95 As discussed above, the Tax Office expressed concern that the bill would conflate the substantive matter before a court with determinations on whether the obligation has been breached. It stated that this would 'make the whole process more costly, more delayed and more uncertain'.<sup>125</sup> The Tax Office expanded on this point by way of example, suggesting that:

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121 Office of the Inspector-General of Taxation, *Submission 26*, p. 1.

122 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 26 October 2018, pp. 8–9.

123 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 26 October 2018, p. 9.

124 Australian Government, *Productivity Commission recommendations implemented by the Australian Government*, April 2016, pp. 4–5.

125 Mr Tanna, Tax Office, *Committee Hansard*, 14 June 2018, p. 30.

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...if you went to the court and said, 'Look, there's a breach of a model litigant. We want this investigated,' you would go to the Ombudsman. You would then make your application to the Federal Court—breach of model litigant. Meanwhile, you get a stay. The tax issue is put to one side, and the court is then to determine whether there's been a breach of the model litigant [obligation]. Assuming that it's not relevant to the determination of the substantive issue, you've got that cost and delay in trying to determine whether there's been a breach of the model litigant obligation. Meanwhile, there's the costs of the taxpayer...having to prove that there was a breach of the model litigant [obligation], and the court then having to determine whether that's the case, then giving procedural fairness, obviously, to the commissioner or any other Commonwealth agency, to answer that. And if one doesn't agree, they go on appeal. Meanwhile, the tax dispute is still left to be determined.<sup>126</sup>

3.96 The Attorney-General's Department suggested that even though there is no fee to apply to the Ombudsman, 'there may well be a cost in having legal representatives or, indeed, just a cost in preparing a submission to make to the Ombudsman'.<sup>127</sup>

3.97 Although a court may not be required to wait for the Ombudsman to conclude its investigation, the Attorney-General's Department stated that 'if you're opening up another avenue for the Ombudsman to investigate, the court would very likely defer until such time as the investigation by the Ombudsman is complete'.<sup>128</sup> The department also noted there is a prospect for appeals to be made in response to a court order relating to the obligation.<sup>129</sup>

3.98 The Legal Services Commission of South Australia submitted that Ombudsman investigations may take some time, thereby delaying the matter:

Investigations by an Ombudsman necessarily have their own formalities and procedures and have the potential to delay any court matter for a considerable time causing further loss to the parties involved.<sup>130</sup>

3.99 The Ombudsman submitted that the bill effectively places a 'soft time limit' of 60 days on Ombudsman investigations.<sup>131</sup> It explained that previous investigations concerning the obligation have extended beyond 60 days, but it depends on the complexity of the matter. Some investigations may be straightforward but others might be quite onerous on both the Ombudsman and the Commonwealth litigant,

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126 Mr Tanna, Tax Office, *Committee Hansard*, 26 October 2018, p. 17.

127 Mr Anderson, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 31.

128 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 39.

129 Mr Anderson, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 29.

130 Legal Services Commission of South Australia, *Submission 2*, pp. 1–2.

131 Commonwealth Ombudsman, *Submission 4*, p. 5; also see proposed subparagraph 55ZGB(1)(b)(v) of the *Judiciary Act 1903* in the bill.

noting that the Ombudsman arrives at each complaint without prior knowledge of the issue.<sup>132</sup> The Ombudsman explained why some of these matters can be complex:

Although on their face the model litigant provisions are a reasonably plain English document about limiting the scope of legal proceedings where possible and so on and so forth, in any given case the set of facts that give rise to the Commonwealth taking one view and the other person in the litigation taking another view might require quite a lot of digging into the history of the case, digging into the case law and digging into the policy underpinnings of what it is that the relevant department or agency is arguing versus the individual and so on.<sup>133</sup>

3.100 The Ombudsman further noted that, in addition to the possibly burdensome investigation, to ensure procedural fairness both sides would likely be given an opportunity to have a say on the view being formed by the Ombudsman.<sup>134</sup>

3.101 Some submitters raised concerns that litigants may seek to raise matters relating to the obligation in order to intentionally delay the court's proceedings, particularly where delay is to their advantage. For instance, the Attorney-General's Department highlighted that the bill does not provide a clear basis for a court to assess a 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.<sup>135</sup>

3.102 The Law Council raised the possibility that a private litigant might seek a stay of proceedings as a strategy to, for example, 'distract attention by the Commonwealth and its lawyers from the conduct of the litigation'.<sup>136</sup> The Department of Home Affairs posited that the bill likely incentivises parties to proceedings to allege non-compliance with the obligation 'in order to further delay the resolution of their proceedings'. If this risk is realised then there may be further incentive for litigants in migration and citizenship cases 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.<sup>137</sup>

3.103 On a similar point, the Tax Office suggested that the bill would 'allow egregious and vexatious taxpayers to side-step the substantive issues within the

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132 Commonwealth Ombudsman, *Submission 4*, p. 5; Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 14 June 2018, p. 45.

133 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 14 June 2018, p. 43.

134 Mr Manthorpe, Commonwealth Ombudsman, *Committee Hansard*, 26 October 2018, p. 7.

135 Attorney-General's Department, *Submission 10*, p. 8.

136 Law Council, *Submission 11*, p. 9; also see Name withheld, *Submission 23*, p. 1.

137 Department of Home Affairs, *Submission 12*, p. 7.

litigation and create delays by raising technical arguments regarding alleged non-compliance' with the obligation.<sup>138</sup> Indeed, its representatives told the committee that the use of interlocutory procedures to delay litigation is increasingly common in certain litigation, particularly with 'egregious taxpayers', and that this 'adds to the cost for the Commonwealth and makes it much more difficult for us to run litigation'.<sup>139</sup>

3.104 The Department of Home Affairs submitted that any additional delays are likely to increase costs for all parties to the proceedings.<sup>140</sup> Moreover, the Attorney-General's Department argued that any significant additional workload for the courts would introduce delay for all matters and 'require an assessment of associated resourcing requirements as against other government funding priorities'.<sup>141</sup>

3.105 However, the committee also heard evidence indicating that the bill is unlikely to cause substantial delays in proceedings. Mr Stewart of the Rule of Law Institute was asked about the risk of delays caused by the court needing to consider these matters. He stated that:

...if the court was of the view that the process was being abused then, for the reasons and the sections that I have just referred to, which are 37N and 37M of the Federal Court Australia Act, the judge is required, as are the parties, as are their lawyers, to conduct the proceedings speedily, efficiently and with as little cost as possible. So I don't see that as an issue.<sup>142</sup>

3.106 In its submission, the Rule of Law Institute advanced that any costs or delays 'are likely to be off set in an early resolution of litigation, which is the aim of the model litigant rules.' It further argued that, while it disputes the risk of costs and delays, 'there is always a price for transparency, credibility and fairness'.<sup>143</sup>

3.107 In addition, some inquiry participants suggested that the issue of costs and delays could be partially addressed by amendments to the bill (discussed above) that would separate an Ombudsman investigation from the courts. As Mr Taylor, President of the Queensland Law Society, stated when explaining these amendments:

The complaint process—while the Ombudsman has a role to play—should be dealt with at the same time as the litigation is proceeding. The complaint process itself should not be able to be utilised by a vexatious litigant—I think the term's been used before—or by having unmeritorious complaints to otherwise interfere with the conduct of the primary litigation. The complaint process should run parallel to the litigation, be dealt with at the

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138 Tax Office, *Submission 3*, pp. 7–8.

139 Mr Tanna and Mr Todd, Tax Office, *Committee Hansard*, 26 October 2018, p. 20.

140 Department of Home Affairs, *Submission 12*, p. 7; also see Department of Human Services, *Submission 1*, p. 3.

141 Attorney-General's Department, *Submission 10*, p. 8.

142 Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 16.

143 Rule of Law Institute, *Submission 18*, p. 7, p. 8.

same time and be dealt with basically on the side by the Ombudsman, who can then make their findings known to the parties.<sup>144</sup>

### Issues relating to lawyers

3.108 Civil Liberties Australia stated that the Attorney-General's Department is responsible for educating public servants about the obligation, but in its view it had not done so satisfactorily.<sup>145</sup> The President of Civil Liberties Australia, Dr Kristine Klugman, argued that 'since the outsourcing of legal services the problem has got worse, because, as you say, those lawyers want to win at all costs.'<sup>146</sup> Her colleague, Mr Rowlings, explained further:

The government operates on a win-at-all-costs basis. That is exactly what it does. It employs commercial lawyers whose attitude is that. If a department didn't have that attitude when it went to a commercial operation, which it did roughly 10 years ago, with outside lawyers that culture was imported into the Commonwealth government, and that's where [the] problem started.<sup>147</sup>

3.109 However, the Tax Office stated that it provides a copy of the obligation in every brief to an external firm, draws their attention to it orally and in writing, and the obligation is part of the agreement between that firm and the Tax Office.<sup>148</sup>

3.110 Indeed, paragraph 6.2 of the Directions requires the following:

Briefs to counsel in matters covered by the model litigant policy are to enclose a copy of the Directions on The Commonwealth's Obligation to Act as a Model Litigant, at Appendix B, and instruct counsel to comply with the policy.

3.111 Some submitters also raised the risk that certain provisions of the bill may expose lawyers to the risk of personal sanction for breaches of the obligation.<sup>149</sup> The Department of Human Services expressed concern that under the bill:

...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.<sup>150</sup>

3.112 The department posited that, as a result, the bill may make Commonwealth litigants less likely to litigate a 'novel but arguable point'.<sup>151</sup> Similarly, the Tax Office

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144 Mr Taylor, Queensland Law Society, *Committee Hansard*, 14 June 2018, p. 21.

145 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

146 Dr Kristine Klugman, President, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

147 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, 14 June 2018, p. 10.

148 Mr Todd, Tax Office, *Committee Hansard*, 14 June 2018, p. 31.

149 See Items 5 and 6 of Schedule 1 of the bill.

150 Department of Human Services, *Submission 1*, p. 7.

151 Department of Human Services, *Submission 1*, p. 7.



submitted the bill may expose officers to personal sanctions for contraventions of the obligation, which could 'indirectly lead to a culture of risk aversion in decision making'. It further stated that the bill may make legal firms reluctant to act for the Tax Office, 'which in turn impacts the long-term quality and efficiency of the ATO's legal practice and the outcomes the ATO can achieve'.<sup>152</sup>

3.113 The Law Council outlined the standards and regulations that already apply to lawyers acting for the Commonwealth, particularly Attorney-General's lawyers under section 55E of the Judiciary Act. It submitted that these arrangements should be maintained, and that they should not be brought 'into the scope of investigation and formulation of recommendations by the Commonwealth Ombudsman'.<sup>153</sup> Rather:

...complaints about Commonwealth litigant legal practitioners in relation to contraventions of the model litigant obligation, which raise allegations of unsatisfactory professional conduct or professional misconduct, should continue to be dealt with by the relevant state or territory legal profession complaints handling authority, rather than by the Commonwealth Ombudsman.<sup>154</sup>

3.114 The Rule of Law Institute took issue with this argument. Its Vice-Chairman, Mr Stewart, advanced that while professional misconduct proceedings may be possible:

We need to deal with these things during the current court process. If there is a court process going on, where a litigant gets a whiff that that might be some breach in the model litigant rules, it needs to be dealt with on the spot. It can't be dealt with two or three years later, after litigation has finished and appeals have been exhausted. Part of what is good about this bill is that it deals with it during the course of the litigation.<sup>155</sup>

## **Other issues**

3.115 This section briefly outlines other issues that were raised in evidence to the committee.

3.116 One submitter, whose name was withheld, commended the intention and purpose of the bill but cautioned that it may cause 'a number of unintended consequences which may detract from the enforcement of the obligations.' The submitter proposed an alternative model of enforcing the obligation, in which parties would not be required to make a complaint to the Ombudsman. Rather, they could bring an application before an independent judge (sitting in the same court as the trial

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152 Tax Office, *Submission 3*, pp. 6–7; also see Mr Tanna, *Committee Hansard*, 14 June 2018, p. 32.

153 Law Council, *Submission 11*, p. 10.

154 Law Council, *Submission 11*, p. 10.

155 Mr Stewart, Rule of Law Institute, *Committee Hansard*, 14 June 2018, p. 15.

judge), who could make declarations about the Commonwealth's conduct and make any orders necessary to ensure the Commonwealth complies with the obligation.<sup>156</sup>

3.117 Separately, the submission from the Attorney-General's Department opposed the bill.<sup>157</sup> One risk raised by the department was that the bill could lead to an 'overly technical' approach to the model litigant 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.<sup>158</sup>

3.118 The department explained that, currently, the obligation is 'flexible and fluid to allow it to be adapted to the specific circumstances of a matter'. It supported a principles-based approach over a technical one because 'it encourages a reflective approach by entities and their legal representatives rather than simply seeking to comply with technical requirements'.<sup>159</sup>

3.119 The Attorney-General's Department further submitted that the bill is not merely unnecessary; it 'would, in fact, cause harm'. The departmental representative suggested the bill would 'hold out to people the prospect that they will get the Ombudsman and the court addressing their underlying sense of grievance'.<sup>160</sup> However, of those who allege breaches of the obligation, a 'very small subset' has their allegation confirmed, and so:

...there would be people who would be very sincerely believing that there's been a model litigant breach in their case. They'd raise that concern. The court can stay their matter. The Ombudsman can look into it. We don't think it's necessarily going to actually change their position at all.<sup>161</sup>

3.120 In cases where this process doesn't change the person's position, the departmental representative suggested it would 'be difficult for them, emotionally and otherwise'.<sup>162</sup>

3.121 Finally, the Attorney-General's Department put it to the committee that litigants already have a number of mechanisms available to them if they wish to raise concerns about a Commonwealth litigant's conduct. This includes raising their

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156 Name withheld, *Submission 23*, p. 1.

157 See, for example, the 'drafting issues' presented by the department at Attorney-General's Department, *Submission 10*, pp. 10–11.

158 Attorney-General's Department, *Submission 10*, p. 8.

159 Attorney-General's Department, *Submission 10*, p. 8.

160 Mr Anderson, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 31.

161 Mr Anderson, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 29.

162 Mr Anderson, Attorney-General's Department, *Committee Hansard*, 26 October 2018, p. 31; also see p. 29.

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concerns with the relevant agency, complaining to the Ombudsman, or seeking relief through administrative review.<sup>163</sup>

3.122 In addition, the Tax Office drew attention to its alternative dispute resolution work, which includes 'a number of alternative dispute resolution services tailored to the small business market and the nature and complexity of their disputes'.<sup>164</sup>

3.123 Regarding alternatives to the bill, both the Attorney-General's Department and the Department of Home Affairs referred to the Attorney-General's Department's *Secretary's Review of Commonwealth Legal Services*, published in November 2017.<sup>165</sup> This review made recommendations about how the Commonwealth conducts legal work, and the Attorney-General's Department said that the review is currently with government for consideration. The Attorney-General's Department explained that:

...[s]everal 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.<sup>166</sup>

### **Committee view**

3.124 The committee strongly supports the principle of 'fair play' that underpins the Commonwealth's obligation to act as a model litigant.

3.125 When engaged in litigation, the Commonwealth often has access to extensive resources and legal expertise, as well as an established reputation before the courts. It is incumbent on Commonwealth litigants to act fairly and in the public interest, rather than seek to 'win at all costs'. However, the Commonwealth should also act firmly and properly to protect its interests.

3.126 Given the importance of the Commonwealth's compliance with the obligation, the committee commends the underlying intent of the bill. The committee considers the bill is generally consistent with the Productivity Commission's recommendation, even allowing that it goes beyond what would be necessary to satisfy the recommendation.

3.127 Nonetheless, the committee considers that the specific provisions of the bill may not be the most appropriate or effective way to increase and ensure compliance with the obligation. The committee is conscious of the risk of unintended consequences, particularly noting that some submitters expressed uncertainty about how the bill would operate on certain points.

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163 Mr Gifford, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 35.

164 See, for example, Response by the Tax Office to Self-Employed Australia, *Submission 19*, pp. 7–8; Mr Tanna, Tax Office, *Committee Hansard*, 26 October 2018, p. 24.

165 Attorney-General's Department, *Submission 10*, p. 11; Department of Home Affairs, *Submission 12*, p. 7.

166 Attorney-General's Department, *Submission 10*, p. 11.

3.128 The committee also does not wish to unduly dismiss the risk of increases to costs and delays in litigation which, if realised, could affect litigants, the Commonwealth, the courts, the Ombudsman, and potentially others. Further, it appears that elements of what the bill proposes—including the ability of courts to make orders regarding breaches of the obligation and the ability of the Ombudsman to investigate complaints alleging breaches of the obligation—may already be in place.

3.129 There is merit in the bill and a need for action that would ensure compliance with the obligation. However, further work is required to address concerns about the current version of the bill that were raised in this report and in evidence to the inquiry.

### **Recommendation 1**

**3.130 While the committee recognises that the bill has merit and that action needs to be taken to ensure compliance with the model litigant obligation, the committee recommends that the Senate not pass the bill in its current form.**

3.131 The committee encourages the government to consider what action it could take to address the concerns raised during this inquiry about the Commonwealth's compliance with the obligation. The committee also encourages the Senate to give close consideration to any future bills, or amended bills, that would ensure Commonwealth litigants comply with the obligation without causing unintended consequences.

3.132 The committee expresses its view on some elements of the bill below. It also refers to certain steps that the government may wish to consider taking in an effort to ensure that the Commonwealth complies with the obligation.

#### ***The extent of non-compliance with the obligation***

3.133 The committee received mixed evidence regarding the extent of non-compliance with the obligation. On one hand, the committee notes data provided by the Attorney-General's Department and other government agencies indicating that breaches of the obligation are only alleged in a very small proportion of Commonwealth legal matters—and the number of confirmed breaches is even smaller. It further notes evidence suggesting that most non-compliance issues are generally technical in nature and are quickly addressed.

3.134 However, the committee also heard about the difficulties experienced by people and businesses allegedly due to breaches of the obligation. These cases are concerning. Even allowing that the Commonwealth complies with the obligation in the vast majority of cases, the cases of alleged non-compliance brought to the committee's attention underline the importance of the Commonwealth's obligation to act as a model litigant.

3.135 In the committee's view, the weight of evidence indicates that it is possible that there are instances of non-compliance which have not been recorded in official data.

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## Recommendation 2

**3.136 The committee recommends that the government initiate action to fully ascertain the nature and extent of the problem of non-compliance with the model litigant obligation, such as an independent audit of compliance.**

### *Knowledge and understanding of the obligation*

3.137 It is positive that paragraph 6.2 of the Directions requires briefs to counsel to instruct counsel to comply with the obligation. However, there are questions over whether the parties engaged in litigation with the Commonwealth understand the nature, protections and limits of the obligation. Such understanding is important in ensuring that the Commonwealth is held to account.

3.138 The committee encourages government to consider how it could ensure that all parties in litigation with the Commonwealth are made aware of the existence and content of the model litigant obligation, including action a litigant could take if they feel that the Commonwealth has breached the obligation.<sup>167</sup>

### *The role of courts and tribunals*

3.139 The committee considers that courts should play a role in enforcing the proper conduct required by the model litigant obligation. Such enforcement could incentivise compliance and provide an avenue of redress if the obligation is breached. It would likely be possible for this redress to have effect while the proceedings are still underway.

3.140 The committee heard evidence in favour of enabling tribunals, alongside courts, to enforce the obligation. While there were some concerns raised about this proposal, the weight of evidence indicated that it may be beneficial to adopt a consistent approach that includes tribunals in any proposal relating to enforcement of the obligation by courts.

## Recommendation 3

**3.141 The committee recommends that the government include tribunals (such as the Administrative Appeals Tribunal), as well as courts, in any proposed legislation relating to the enforcement of the model litigant obligation by courts.**

### *The role of the Ombudsman*

3.142 The committee considers that the Ombudsman should have a role in investigating alleged breaches of the obligation. The committee is conscious of evidence indicating that the bill's proposed role for the Ombudsman may be onerous for the Ombudsman's office. If legislative change increases the Ombudsman's responsibilities, it is important that the Ombudsman be appropriately resourced to fulfil all its functions.

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<sup>167</sup> The committee is aware that a past recommendation of the House of Representatives Standing Committee on Tax and Revenue covered similar ground to this point; see recommendation 9, House of Representatives Standing Committee on Tax and Revenue, *Tax disputes*, March 2015.

3.143 The committee notes that the Ombudsman indicated that it is already able to conduct investigations into complaints about non-compliance. However, it also understands that the Ombudsman may currently tend to exercise its discretion not to investigate these complaints, including on the basis that the matter is before a court, and perhaps refer the matter to the OLSC instead.

3.144 The committee notes concerns about the interaction between courts and the Ombudsman, including potential legal procedural issues caused by the Ombudsman's investigation. It appears that these may be alleviated, to some extent, by separating Ombudsman investigations from court processes, as some submitters suggested.

3.145 A further point of evidence related to the jurisdictional boundary between the Commonwealth Ombudsman and the Inspector-General of Taxation. The committee notes that the current version of the bill provides for all complaints relating to breaches of the obligation to be within the scope of the Ombudsman, rather than the Inspector-General, even where they relate to tax administration action.

3.146 Careful consideration should be given to how best to divide responsibilities between these two bodies in any future legislative change. The committee suggests that this consideration use the existing jurisdictional boundary as a starting point, noting that it appears sensible to divide responsibilities based on whether or not a matter relates to tax administration action.

**Senator the Hon. Ian Macdonald**  
**Chair**