

# The government's model litigant policy — ethical issues

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Recent hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse have brought the model litigant obligations to the fore for many government agencies. The Royal Commission is investigating whether current government policies go far enough to ensure litigation involving child sexual abuse claims are dealt with appropriately.<sup>1</sup> The investigation is a timely reminder of the duties of government organisations to act as a model litigant and will no doubt highlight some of the ethical issues facing lawyers for those organisations.

## The origins of government as the model litigant

The concept of the government acting as the model litigant is not ideological. It has firm common law roots and can be traced back as far as 1912 to Griffiths CJ in *Melbourne Steamship Co Ltd v Moorehead* where his Honour described it as the “old-fashioned tradition, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects”.<sup>2</sup> The rationale behind this is simple. There is an expectation that a government (and its emanations) will deal honestly and fairly with its citizens and discharge its powers for the public good. Government has no legitimate private interest in performing its functions and is, more often than not, larger and better resourced than private litigants.<sup>3</sup> Hence, the courts expect the government and its agencies to act as a “moral exemplar”<sup>4</sup> throughout the litigation process.<sup>5</sup>

In an effort to codify and confirm their commitment to their model litigant obligations, the Commonwealth Government and some state and territory governments have adopted written policies. The Commonwealth,<sup>6</sup> Victoria,<sup>7</sup> Queensland,<sup>8</sup> New South Wales<sup>9</sup> and the Australian Capital Territory<sup>10</sup> all follow similar policies, while Western Australia, Tasmania and South Australia are subject to the principles of the common law.

## Who do the model litigant obligations apply to?

The Commonwealth's policy is the most prescriptive of the written policies that have been adopted. This policy is set out at Appendix B to the *Legal Services*

*Directions 2005*, made under s 55ZF of the Judiciary Act 1903 (Cth). The model litigant obligations are binding on all government agencies,<sup>11</sup> including all Commonwealth corporate entities and Commonwealth companies that are subject to the Public Governance, Performance and Accountability Act 2013 (Cth)<sup>12</sup> and that handle claims or conduct litigation in the name of, or on behalf of, the Commonwealth.<sup>13</sup> Typically, the states' and territories' policies are expressed to apply to their departments and agencies. The obligations also apply to private-sector lawyers appearing on behalf of the Crown. The written policies provide that the obligations apply before courts, tribunals, inquiries, in arbitration and other alternative dispute resolution processes. It is important for all inhouse lawyers to be aware of whether they are bound by their respective government's model litigant policies and/or the common law principles so that they adhere to the particular requirements.

## How does the model litigant conduct itself?

The content of the obligation at common law has not always been clear, but the written policies seek to provide clarity and guidance on what conduct is required of a model litigant. Behind each of the duties is an overarching duty to act honestly, fairly, with complete propriety and in accordance with the highest professional standards. It goes beyond the requirement for lawyers to act in accordance with their ethical obligations and merely acting honestly or in accordance with the law and court rules. The policies all variously refer to the following specific duties, some of which have long been recognised by the courts:

- dealing with claims promptly;
- minimising delay in proceedings;
- making an early assessment of the prospects of success and potential liability in claims;
- paying legitimate claims without litigation;
- acting consistently in the handling of claims and litigation;
- endeavouring to avoid, prevent or limit the scope of litigation and participating in alternative dispute resolution where appropriate;

- minimising costs in proceedings;
- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- not taking technical points unless the agencies interests would be compromised;
- not undertaking and pursuing appeals unless there are reasonable prospects for success or the appeal is otherwise justified in the public interest; and
- apologising when the government or its lawyers have acted wrongfully or improperly.

However, the model litigant obligations do not oblige the Crown to “fight with one hand behind its back in proceedings”.<sup>14</sup> The Crown is not prevented from acting firmly and properly to protect its own interests and “has the same right as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant”.<sup>15</sup>

## Enforcement

The agencies themselves are responsible for enforcing the model litigant policy. Agency heads are required to monitor and report on their agency’s compliance with the obligations. Again, the Commonwealth’s policy is the most prescriptive in this area. The *Legal Services Directions 2005* are not enforceable by an applicant<sup>16</sup> and the issue of non-compliance with those Directions may not be raised in any proceeding except by, or on behalf of, the Commonwealth.<sup>17</sup> The Attorney-General has the ultimate responsibility for non-compliance with the obligations and can impose sanctions, or for extreme or repeated breaches, can issue a specific direction under s 55ZF of the Judiciary Act regarding the use of particular advisers or requiring the agency to change its legal advisers.

Ultimately, however, the obligation is an ethical requirement rather than a legal standard in litigation.<sup>18</sup> None of the policies give legislative power to the courts to enforce them. Rather, the courts hold government legal officers accountable through judicial criticism and the expectation of assistance in the administration of justice by the Crown. There has also been conflicting authority for the proposition that the courts can take conduct falling short of the standard of a model litigant into account when determining questions of costs.<sup>19</sup> In any event, it is prudent for inhouse counsel to consider the potential impact of such conduct on costs when advising government agencies.

## Ethical issues and practical considerations

The conduct of some state agencies in dealing with child sexual abuse claims in civil litigation has been the subject of recent and ongoing scrutiny by the Royal

Commission. What the Royal Commission has questioned, and sought further submissions on, is whether the model litigant obligations go far enough to ensure claims of this nature are appropriately dealt with. A number of the ethical issues have been highlighted by the Royal Commission, including:

- Has the agency shown sensitivity in the collection of evidence in claims of this nature?
- Has the agency been mindful of the traumatic experience litigation of this nature can be for applicants through ensuring litigation is not unnecessarily drawn out and that the conduct during the litigation is not disproportionate to the objectives of the applicant?
- Has the agency acted consistently in the handling of all claims?

The fact that these issues continue to face scrutiny emphasises the necessity of those advising or instructing on behalf of government agencies to ensure they are continually complying with their model litigant obligations.

## Conclusions

It is important that all inhouse lawyers in government departments or agencies remain aware of the extent of the model litigant obligations as ethical issues will frequently arise. Active consideration of the obligations will prevent breaches occurring.

In particular, lawyers should consider the following practical issues:

- Minimising costs and delay is paramount. A court will not look favourably on a government agency that, for example, fails to narrow the issues in dispute, raises purely technical defences or forces an applicant to prove a fact that it knows to be true. Consider the use of agreed statements of facts where appropriate to allow a court or tribunal to deal only with the legal issues in dispute. Moreover, the early exchange of evidence such as expert reports will assist in determining the relevant issues.
- Compliance with court rules or procedures is expected of government bodies regardless of competing demands or resourcing. It has been held that the lack of resources available to a government agency is not an answer to a delay in compliance with a court timetable.<sup>20</sup>
- As the obligation requires complete propriety and honesty with the court or tribunal, the model litigant should avoid traditional litigation “strategies” or “tactics”. Importantly, if opposing lawyers fail to raise a critical issue, it is incumbent on

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the model litigant to raise such an issue, even if it is adverse to its case.<sup>21</sup> Likewise, a court or tribunal's oversight in the exercise of its powers should be brought to its attention as soon as possible, even if this would be adverse to the interests of the government agency.<sup>22</sup>

- Special regard should also be had to claims which involve an unrepresented litigant. The model litigant's duty to assist a court or tribunal in the administration of justice in an effort to correct power imbalances is even more pertinent where a claimant is self-represented. Lawyers for the Crown should be respectful, supportive and informative so as to avoid or mitigate a self-represented party's confusion or anxiety. However, it is of course important to maintain boundaries and make it clear to the self-represented party the extent to which a government lawyer can help or advise them.
- Any action taken in contemplation of a claim or litigation should be considered in light of the model litigant obligations. For example, the destruction of documents that could prejudice a future claimant or the nature of the initial contact with the claimant can have wide-ranging future consequences.
- Regard to the subject matter of the claim should always be had. It is not always appropriate to rely on statutory limitations or request further particulars in matters of a highly sensitive nature.<sup>23</sup>



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## Footnotes

1. See Chapter 10.5 *Model litigant approaches* in *Consultation Paper on Redress and Civil Litigation*, Royal Commission into Institutional Responses to Child Sexual Abuse, www.childabuse.royalcommission.gov.au.
2. *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333; 18 ALR 533; [1912] HCA 69; BC1200025 at [342].
3. *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166; 128 ALD 489; [2012] FCAFC 90; BC201204504 at [42].
4. *ASIC v Hellicar* (2012) 247 CLR 345; 286 ALR 501; [2012] HCA 17; BC201202609 at [239] per Heydon J; *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166; 128 ALD 489; [2012] FCAFC 90; BC201204504 at [42].
5. *Kenny v South Australia* (1987) 46 SASR 268; *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155; 144 ALR 695; BC9702362.
6. *Legal Services Directions 2005*, October 2012, Appendix B: "The Commonwealth's obligation to act as a model litigant", www.comlaw.gov.au.
7. Department of Justice and Regulation (Vic), *Model Litigant Guidelines: Guidelines on the State of Victoria's Obligation to Act as a Model Litigant*, March 2011, <http://assets.justice.vic.gov.au>.
8. Department of Justice and Attorney General (Qld), *Model Litigant Principles*, October 2010, www.justice.qld.gov.au.
9. Model Litigant Policy for Civil Litigation, July 2008, www.justice.nsw.gov.au.
10. Law Officer (Model Litigant) Guidelines 2010 (No 1), March 2010, www.legislation.act.gov.au.
11. The *Legal Services Directions 2005* refers to agencies subject to the Financial Management and Accountability Act 1997 (Cth) which has now been superseded by the Public Governance, Performance and Accountability Act 2013 (Cth).
12. The *Legal Services Directions 2005* refers to companies subject to the Commonwealth Authorities and Companies Act 1997 (Cth) which has now been superseded by the Public Governance, Performance and Accountability Act 2013 (Cth).
13. See para 12 of the *Legal Services Directions 2005* (Cth).
14. *Brandon v Commonwealth* [2005] FCA 109; BC200500350 at [11] per Whitlam J.
15. Above, n 14.
16. Judiciary Act 1903 (Cth) (Judiciary Act) s 55ZG(2).
17. Judiciary Act s 55ZG(3); *Caporale v Deputy Commissioner of Taxation* (2013) 212 FCR 220; 302 ALR 246; [2013] FCA 427; BC201302317.
18. Justice Tony Pagone, "Speech — The Model Litigant and Law Clarification" (VSC) [2008] VicJSchol 17.
19. See cases discussed in Christopher Peardon, 'What cost to the Crown a Failure to Act as a Model Litigant' (2010) 33 *Australian Bar Review* 239.
20. *Kenny v South Australia* (1987) 46 SASR 268 at 273.
21. *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166; 128 ALD 489; [2012] FCAFC 90; BC201204504.
22. *SZLPO v Minister for Immigration and Citizenship (No 2)* (2009) 108 ALD 303; 255 ALR 435; [2009] FCAFC 60; BC200904333.
23. See for example the New South Wales and Victorian additional guiding principles for dealing with civil claims of child sexual abuse which are intended to complement their existing model litigant policies.