

Mona Krombholz

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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
By email [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

*Re Submission*

*Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017*

Thank you for providing the opportunity to make a submission into the proposed Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017.

The reason for my interest in the proposed legislation is due to my personal experience as an Applicant against the Commonwealth of Australia in former proceedings at the Fair Work Commission and Federal Court of Australia.

There are significant obstacles for individuals seeking to resolve disputes with the Commonwealth, which, in my experience, leaves no option other than to seek legal redress. Any opportunity that addresses the Commonwealth's requirement to comply with its model litigant obligations would be a welcome change.

The submission and my identity are suitable for publication.

Regards,

Mona Krombholz

## **Submission to the Senate Committee on Legal and Constitutional Affairs Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017**

### **INTRODUCTION**

The Productivity Commission reported on its inquiry into access to justice in September 2014. The report recommended that model litigant obligations should be monitored and enforced by establishing formal avenues of complaint to government ombudsmen regarding contraventions of model litigant obligations, and for the courts and tribunals to be empowered to enforce those obligations.

The Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (the 'Bill') provides authority for the Office of the Commonwealth Ombudsman ('Ombudsman') to accept complaints from parties during a legal proceeding, with respect to the Commonwealth's compliance with its model litigant obligations.

This may pose a number of issues with respect to the Ombudsman's ability to exercise independence in administrative oversight<sup>1</sup> of Commonwealth litigants, and whether the intervention of the Ombudsman will add value to the proceeding once it has already commenced. A further issue is whether the Bill mandates the courts and tribunals to enforce model litigant obligations on Commonwealth litigants.

My view is that the Bill is unlikely to ensure that Commonwealth litigants comply with the model litigant obligations, or for the courts or tribunals being required to enforce model litigant obligations on Commonwealth litigants. I have proposed a number of amendments to the Bill with the view that it may provide a way to address these issues.

### **BACKGROUND**

In 2014 and 2015, I made an application to the Ombudsman disclosing wrongdoing in the Department of Defence (Defence), initially conduct of the kind that included fraud, corruption, and abuse of public office involving senior officials and suppliers on a \$1 billion public project. As a result of the Ombudsman referring my allegations back to Defence to conduct its own investigations, Defence engaged in reprisal action, obstructed and produced false or misleading documents during investigations, and commissioned false or misleading statements from witnesses during a legal proceeding. The Ombudsman's investigations, which were essentially 'administrative reviews', took no action against Defence or senior officials, because it did not investigate the substantive conduct. The matters ended up at both the Fair Work Commission ('FWC') and Federal Court of Australia ('FCA').

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<sup>1</sup> The question of the Commonwealth's independence in administrative oversight of the public sector was considered by the Parliamentary Joint Committee on Corporations and Financial Services – Whistleblower Protections, September 2017, page 152, 12.53.

### *Fair Work Commission (FWC)*

Three applications were made to the FWC to resolve disputes. The FWC allowed Defence to have legal representation, and as a result, none of the matters were resolved as the Commonwealth took the view that it could wear down my efforts. It resulted in escalation to the FCA.

The Commonwealth spent approximately \$300,000 for FWC representation and legal services. Defence appointed a legal firm that was subject to my whistleblower investigations, to defend my legal claims. An FOI copy of Defence legal expenditure for FWC matters is available.

### *Federal Court of Australia*

The Commonwealth was granted an order, on their application, for me to name the personnel involved in alleged civil contraventions, ignoring my concerns that there were over 50 persons involved and potentially still under fraud and corruption investigations, and that by naming them could result in the parties and agencies sharing information, and affect the outcome of investigations, particularly by the Australian Federal Police ('AFP').

Over five Commonwealth agencies were named under the Commonwealth umbrella as the primary respondent, including the Ombudsman, plus 66 other respondents. It was not the full list of those involved in alleged contraventions, however, only those respondents whom I held documented evidence of their involvement were named as respondents. A copy of the court order and list of respondents is available on request or through Federal Court search.

The Commonwealth confirmed in Court that it was likely to represent current and former Commonwealth officials, therefore would be providing indemnity. This is permitted under the *Legal Services Directions* for civil matters, however given the alleged criminal offences against most of the respondents, the Commonwealth had dismissed its obligation as the Commonwealth prosecutor. It cannot represent persons in a civil matter and prosecute them for criminal offences at the same time.

FOI documents confirmed that the Commonwealth agencies worked together instead of independently, to conduct investigations, including allowing those named as respondents to conduct investigations and make decisions as to the outcome of those investigations, during proceedings. To the best of my knowledge, none of the alleged offenders, who were respondents at the time, have been charged.

The Commonwealth, in pursuit of protecting itself against civil claims and to protect respondents from being exposed to criminal liability, failed to uphold the rule of law.

During proceedings, I raised the issue that the lawyers had failed to comply with the Model Litigant Obligations, including the fact that the matter had ended up in a court when it knew the facts were known to be true. The court paid little credence to the model litigant obligations.

## **OMBUDSMAN AS AN INVESTIGATIVE AGENCY**

For disclosure purposes, submissions were made to the Senate Committee into establishing a National Integrity Commission (No.38) and Parliamentary Joint Committee on Corporate and Financial Services Whistleblower Protections ('Parliamentary Committee'), number 71.

### ***The Ombudsman's performance***

The Productivity Commission issued its report in 2014, however the Ombudsman has since come under scrutiny, particularly by the Parliamentary Committee<sup>2</sup> that reviewed the Ombudsman's performance in managing the public interest disclosure scheme.

The Parliamentary Committee recognised that the Ombudsman had failed to investigate wrongdoing in Commonwealth agencies, in which it had powers to conduct own motion investigations, only to refer matters back to those agencies in which the complaint had been raised, to investigate their own conduct.<sup>3</sup> The Ombudsman also exposed whistleblowers to reprisal, then washed its hands of any responsibility to investigate those reprisals, which it also had the power, as reprisal action against a Commonwealth official is disclosable conduct under the PID Act.<sup>4</sup>

### ***Independence in question***

The question that should be asked by the Committee, in my view, is whether the Ombudsman is sufficiently independent of the Commonwealth to conduct such an investigation, if and when the situation arises.

The question was considered by the parliamentary Committee in terms of the Ombudsman's independent investigative oversight function,<sup>5</sup> and further, whether it would be suitable as a Whistleblower Protection Authority to investigate disclosures and any subsequent reprisals. The Committee, upon consideration of the Ombudsman's performance on managing the PID scheme over nearly three years, recommended that any oversight functions that currently reside with the Ombudsman would need to be transferred to the new authority.<sup>6</sup>

This is similar to my experience, where the Ombudsman failed to investigate serious matters of fraudulent and corrupt activity in Defence, and its judgment in referring matters back to Defence instead of the AFP to investigate what inevitably became a fraud investigation involving the AFP, raises the issue of whether the Ombudsman had taken a course of action to prevent a thorough investigation into senior officials.

The Ombudsman also failed to investigate conduct of Commonwealth officials during FWC proceedings, which created further complexity in which perjury and perverting the course of justice became a live issue, and within the Ombudsman's authority to investigate as it involved Commonwealth officials, but it declined to do so.

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<sup>2</sup> Parliamentary Joint Committee on Corporations and Financial Services – Whistleblower Protections, September 2017 ('Parliamentary Joint Committee').

<sup>3</sup> Parliamentary Joint Committee Report, page 152, 12.54,

<sup>4</sup> Ibid, page 154, 12.63

<sup>5</sup> Parliamentary Committee Report, page 152, 12.53.

<sup>6</sup> Ibid, pages 157-158, 12.81 – 12.83.

### ***Competence in question***

The second question that should be asked by the Committee is whether the Ombudsman is sufficiently competent to conduct investigations that require professional legal expertise, not an administrator who may not possess the necessary legal skills or knowledge to identify potential civil or criminal offences.

The Ombudsman may be required to investigate professional misconduct by lawyers, including barristers acting for Commonwealth litigants because they are required to act honestly, ethically and uphold professional standards as part of it model litigant obligations. The Ombudsman would need to be sufficiently well versed in the duties and obligations of lawyers as officers of the court, in order to apply the model litigant obligations during its investigation.

In my experience, the Ombudsman's office will commence a formal investigation, only to water it down to a review, or decide not to investigate any further once it realises the serious implications of the conduct that has been brought to its attention, thereby protecting the Commonwealth and its officials.

This appears to be consistent with the proposed legislation at section 55ZBG of the Act, where the Ombudsman can decide not to investigate or discontinue an investigation, or transfer the complaint without any consequences.

### ***Scope of investigations***

Section 5B(2)(c) of the Ombudsman Act, based on my interpretation, suggests that it will exclude investigations in relation to a Commonwealth litigant's commercial activity, and if this is the case, will exclude the Ombudsman from investigating a legal dispute about commercial agreements, for example where the complainant is a supplier to the Commonwealth. If this is the correct interpretation, then the Ombudsman's investigations may be limited, for example, to employment disputes with a current or former employee, or unions. Section 5B(2)(d) also excludes taxation administrative action, however Taxation administration does not fall within the authority of the Ombudsman under the Ombudsman Act.

By reason of the wording in section 5B(1) in the Ombudsman Act, legal work performed by a Commonwealth litigant, and compliance with the model litigant obligations 'is taken to be action that relates to a matter of administration'.

The 'tick box' approach as to whether the Commonwealth litigant has complied with the *Legal Services Directions* as a Model litigant, which is how the Ombudsman currently investigates anyway, is likely to come under scrutiny by a judge presiding over the matter, and the applicant.

Further, a referral to the Ombudsman is a serious matter, for reason that the conduct has occurred during a legal proceeding, and therefore may require the Ombudsman to investigate allegations of perjury, contempt of court or perverting the course of justice. However, by conducting investigations in the form of administrative action<sup>7</sup>, it will not investigate the substance to the complaint.

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<sup>7</sup> The Bill, section 5B(1).

## PROPOSED AMENDMENTS TO THE BILL

If the Ombudsman is given investigative authority in legal matters, I propose some suggestions for the Committee's consideration, to strengthen the checks and balances in the event that the Ombudsman's authority is invoked during a legal proceeding.

### ***Defining a Commonwealth Litigant***

The definition of ***Commonwealth litigant*** at section 2 does not include those acting for Commonwealth litigants unless it is the AGS, thereby excluding a legal practitioner or a legal firm of practitioners that may be acting for a Commonwealth litigant. This is due to the wording that refers to a person or body referred to in subsection 55N(1) of the Act, however that section and subsection title is in relation to a Commonwealth litigant that "may" use the AGS.

There is some inconsistency in describing a person acting for a Commonwealth litigant (that is not the AGS). The inserted sections 55ZGA, 55ZGB and 55ZF(2A) refer to a person or persons "...acting for a Commonwealth litigant...". In contrast, existing section 55ZG(1)(f) refers to "a legal practitioner or firm of legal practitioners, in relation to a matter".

Section 3(1) in the *Ombudsman Act* relies on the Commonwealth litigant definition at section 2 of the Act, which excludes a person acting for a Commonwealth litigant or a legal practitioner or firm of practitioners. Section 5B in the *Ombudsman Act* makes no reference at all to a person acting for a Commonwealth litigant or a legal practitioner or firm of practitioners. The combined effect of these two sections may result in the Ombudsman not being required to investigate any person acting for a Commonwealth litigant, legal practitioner or legal firm that is not the AGS.

The Explanatory Memorandum referred to the Commission's recommendation for the government, their agencies and legal representatives to comply with the model litigant obligations.<sup>8</sup> The definition of a Commonwealth litigant may have limited the Commission's recommendations.

### ***Reference to "applicant" in the Bill***

Section 55ZGB refers to a party to a proceeding that makes an application to the Ombudsman as 'the ***applicant***'. This may create some confusion, for example, where the respondent (which is not the Commonwealth) in a civil proceeding, is an applicant in a matter referred to the Ombudsman, for the same proceeding.

The Explanatory Memorandum referred to "hereafter the applicant". Other suggested words may be considered to replace 'the applicant'. For example, 'the complainant', 'the petitioner', or 'the discloser'.

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<sup>8</sup> Explanatory Memorandum, page 1.

### ***Model litigant obligations: orders***

Section 55ZGB(1)(b)(ii) gives the Ombudsman the option not to investigate or not to continue with an investigation. In my view, this is a loose commitment on the part of the Ombudsman to investigate a matter, but then discontinue an investigation, if in fact, the conduct of the Commonwealth litigant or those acting for the Commonwealth litigant, including lawyers and barristers, have engaged in serious misconduct during the proceeding.<sup>9</sup> The section of the Act needs to be considered in light of the likely situation where the applicant may have been granted an order for a stay of the proceeding which will result in delay.

The Explanatory Memorandum at paragraph 35 appears to shed light on this subsection, referring to section 6(12) of the Ombudsman Act, where the Ombudsman can decide not to investigate matters if it is commercial activity. However, this intention or link to section 6(12) of the Ombudsman Act is not stated in section 55ZGB(1)(b)(ii).

If this is the intention of subsection 55ZGB(1)(b)(ii), then the wording should be amended to reference to section 6(12) of the Ombudsman Act. Otherwise, it leaves the Ombudsman open to decide not to investigate or discontinue an investigation for a range of reasons proscribed under section 6 of the Ombudsman Act.

Section 55ZGB(2)(iii) and (iv) makes provision for the Ombudsman to transfer the complaint, but to whom or what agency is not specified. The intention of these subsections is unclear and there does not appear to be any Explanatory Memorandum notes as to the reason for these subsections. In my view, these subsections should be deleted unless there is a clear reason for their inclusion, otherwise, it leaves the Ombudsman with discretionary power to absolve itself of the responsibility.

### ***Retrospectivity***

Item 7 at Schedule 1 of the Act and Item 3 at Schedule 2 of the Ombudsman Act will have the effect of making the legislation prospective, thereby denying claimants from making applications regarding the prior conduct of Commonwealth litigants void. This suggests that the Commonwealth is acknowledging that it has been able to defeat justice for those seeking redress due to the conduct of Commonwealth litigants, but is not prepared to remedy the matter.

Genuine applicants that have been denied access to justice or have been subject to the conduct of Commonwealth litigants that have contravened the Act will be left to go back to court to reopen the case without the Commonwealth's oversight to potentially investigate the matter and avoid lengthy appeals.

In my view, there is no excuse for the Commonwealth to escape its responsibilities, whatever the cost, to right its wrongs.

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<sup>9</sup> See *Legal Services Directions 2017*, Appendix B Notes.

## **PROPOSED INCLUSIONS IN THE BILL**

The proposed Bill inclusions are for the purpose of ensuring that the Ombudsman is held accountable in the event that they receive a complaint from an applicant in the course of a proceeding for reasons described earlier in this submission, and to give the court greater enforcement rights by law.

### ***Ombudsman as an Intervenor***

The Committee may wish to consider whether the Ombudsman should be joined as an “Intervenor” in a proceeding on application by the applicant as part of the orders that may be made by the court.

When an application is made to the Ombudsman to undertake an investigation whilst proceedings are on foot, the Ombudsman has an interest in the outcome of the proceeding. Further, by joining the Ombudsman as a party to the proceeding, it will put the onus on the Ombudsman to comply with court orders to ensure the proceeding continues to be conducted in an efficient manner, which is an overarching requirement for any judicial proceeding.

The court can make orders as it thinks fit, or on application by the applicant, which may include orders for the Ombudsman to:

- be Joined as an intervenor in the proceeding;
- investigate a particular matter that the court considers necessary;
- complete the investigation within a prescribed period of time;
- advise the court the reason for not investigating a complaint, or not continuing an investigation;
- provide a copy of the Ombudsman’s report to the court for consideration, and the parties to the proceeding.

### ***Immunity from liability***

For the reasons described earlier in the submission, a person or body making a complaint to the Ombudsman, may also be reporting offences or professional misconduct. The Act should include a section providing the applicant with immunity from liability.<sup>10</sup>

However, the applicant is not immune from action for false or misleading statements.

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<sup>10</sup> Section 10 and 11 of the Public Interest Disclosure Act 2013 (PID Act) provides an example of the types of immunity from liability. Section 11 of the PID Act proscribes liability for false or misleading statements etc unaffected.



## Recommendations to the proposed Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (the 'Bill')

### Meaning of Commonwealth litigant

1. Item 1 at Schedule 1 proposes the following definition under s.2 of the Act:

**Section 2 Commonwealth litigant** means a person or body referred to in subsection (1), not including the AGS when providing services under subsection 55N(2).

2. The title to section 55N and subsection 55N(1) of the Act refer to persons and bodies for whom the AGS may provide services:

#### **55N Persons and bodies for whom the AGS may provide services**

(1) The AGS may provide legal services and related services to or for the following:

3. By applying the Commonwealth litigant definition to s.55N(1), taking into account section and subsection titles, it could mean that a Commonwealth litigant is:
  - a. a person or body referred to in s.55N(1) where the AGS “may” provide services; but
  - b. a person or body referred to in s.55N(1), who is not using the AGS for services, falls outside the definition. For example, in situations where a Commonwealth agency has engaged a private firm for representation.
4. The definition excludes a legal practitioner or legal firm engaged to represent the Commonwealth, that is not the AGS. The issue is somewhat resolved at s.55ZGA(1), where a complaint can be made about a “*Commonwealth litigant, or a person acting for a Commonwealth litigant*”.
5. However, at Item 2 at Schedule 2, amendments to the *Ombudsman Act 1976* do not make any reference to “*a person acting for a Commonwealth litigant*” at s.5B.
6. This is inconsistent with the Explanatory Memorandum that included “a person acting for a Commonwealth litigant”.<sup>11</sup> The conflict suggests that the Ombudsman will not investigate “a person acting for a Commonwealth litigant”.
7. In contrast, a legal practitioner or firm of legal practitioners must comply with the Legal Services Directions at section 55ZG(1)(f) of the Act:

#### **55ZG Compliance with Legal Services Directions**

(1) (f) a legal practitioner or firm of legal practitioners, in relation to a matter, if the legal practitioner or firm is acting for a person or body referred to in subsection 55N(1) in that matter.

8. Item 2 at Schedule 1 inserts subsection (2A) in s.55ZF(2) into the Act, for the Attorney-General to ensure that there are Legal Services Directions applying to persons acting for Commonwealth litigants to act as model litigants. However, it is mandatory under section 55ZG(1)(f) of the Act for persons acting for

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<sup>11</sup> Explanatory Memorandum, 2016 – 2017 The Parliament of Australia, Senate, Judicial Amendment (Commonwealth Model Litigant Obligations) Bill 2017, page 1.

Commonwealth litigants to act as model litigants. Further, the wording in section 55ZF(2) is inconsistent to the wording to the section in 55ZG(1)(f) of the Act.

9. The Explanatory Memorandum for the Bill refers to the Productivity Commission's recommendations for the government, their agencies and legal representatives to comply with the model litigant obligations.<sup>12</sup>
10. Item 2 at Schedule 2: the proposed definition of a Commonwealth litigant as described in paragraph 11, will resolve the issue with section 5B of the Ombudsman Act 1976, as described in paragraph 5, for reason that section 5B relies on Item 1 at Schedule 1 subsection 3(1), to define a Commonwealth litigant, which mirrors section 2 of the Act.

### Recommendations

11. Item 1 at Schedule 1, proposed definitional amendment:

***Commonwealth litigant*** means a person or body referred to in subsection 55N(1), or a legal practitioner or firm of legal practitioners, if the legal practitioner or firm is acting for a person or body referred to in subsection 55N(1). A *Commonwealth litigant* does not include the AGS when providing services under subsection 55N(2).

12. Item 4 at Schedule 1: if the above or similar definition is adopted to include a legal practitioner or firm of legal practitioners, then the wording "*or a person acting for a Commonwealth litigant*" can be removed at ss.55ZGA(1), 55ZGB(1)(a), 55ZGB(2).
13. Item 4 at Schedule 1: Subsection (2A) inserted after subsection 55ZF(2) should reference the definition in the Act (s.2). The reference to "*...Commonwealth litigants, and persons acting for Commonwealth litigants*" replaced with:

Section (2A) "*...Commonwealth litigants, within the meaning given by section 2 of the Judiciary Act 1903...*"

### **Reference to 'the applicant'**

14. Item 4 at Schedule 1: section 55ZGA(1) states:

"This section applies if a party to a proceeding (the ***applicant***) has made a complaint to the Commonwealth Ombudsman...."

15. Reference to 'the applicant' is repeated in subsections to 55ZGA(1),(2) and section 55ZGB(1),(2) and its subsections.
16. The Explanatory Memorandum refers to:<sup>13</sup>

"a party to a proceeding (hereafter called 'the applicant') has made a complaint to the Commonwealth Ombudsman that a Commonwealth litigant, or a person acting for a Commonwealth litigant in relation to that proceeding...".

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<sup>12</sup> Explanatory Memorandum, page 6, paragraph 26.

<sup>13</sup> Ibid, page 4, paragraph 16.

17. However, the situation may arise where the respondent (which is not the Commonwealth) in a civil proceeding, is an applicant in a matter referred to the Ombudsman, for the same proceeding.
18. Schedule 2 – Ombudsman, make no reference to an “applicant”. However, it refers to “complaints” at section 5B(3)(a) and (b).

### Recommendation

19. Item 4 Schedule 1: Section 55ZGA(1) and 55ZGB(1)(a) for reasons described at paragraphs 14 to 18:

Replace “the **applicant**” to either:

- “the *complainant*”, “the *petitioner*”, “the *discloser*” or alternative word; or
- adopt the wording used in the Explanatory Memorandum<sup>14</sup> “hereafter called ‘the **applicant**’” to distinguish the applicant in a proceeding, from a party that makes an application to the Ombudsman;
- amend subsections ss.55ZGA and 55ZGB to reflect the wording.

### **Model litigant obligations: orders**

20. Item 4 Schedule 1: Section 55ZGB(1)(b)(ii) states;  
“the Ombudsman informs the applicant of a decision not to investigate or continue to investigate the contravention or potential contravention and has not transferred the complaint”.
21. The section removes the Ombudsman’s obligation to investigate or continue to investigate, however the intention of the Explanatory Memorandum at paragraph 35 refers specifically to commercial activity, proscribed at section 6(12) in the Ombudsman Act.
22. Item 4 Schedule 1: Section 55ZGB(1)(b)(iii) and (iv) states:  
(iii) a person to whom the Ombudsman has transferred the complaint completes an investigation of the contravention or potential contravention;  
(iv) a person to whom the Ombudsman has transferred the complaint informs the applicant of a decision not to investigate or continue to investigate the contravention or potential contravention;”
23. The above section does not describe whom or where the Ombudsman may transfer the investigation, and the Explanatory Memorandum does not appear to provide a reason for the inclusion of the two subsections.

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<sup>14</sup> Explanatory Memorandum, page 4, Para 16.

## Recommendations

24. The following combined recommendations are proposed for section 55ZGB:
- a. amend the wording to section 55ZGB(1)(ii) to read:  
“the Ombudsman informs the applicant of a decision not to investigate or continue to investigate the contravention or potential contravention under section 6 (12) of the *Ombudsman Act 1976*”; and
  - b. delete subsections 55ZGB(1)(iii) and (iv); and
  - c. add section 55ZGB(2):  
“the Ombudsman must give a report on the outcome of the investigation within 60 days from the time the application was made to the Ombudsman, whether or not the investigation was completed. The applicant may give a copy of the report by the Ombudsman to the court or.” and
  - d. the existing section 55ZGB(2) becomes (3).

## **Retrospectivity**

25. Application of the Act at Item 7 Schedule 1 and section 3 of the Ombudsman Act are prospective, however this will deny applicants the right to seek justice for wrongs previously committed by the Commonwealth, as described in the earlier sections of this submission.

## Recommendation

26. Delete both sections at Item 7 Schedule 1 to the Act and Item 3 Schedule 2 of the Ombudsman Act or wording to allow the Act to apply retrospectively.

## **PROPOSED INCLUSIONS**

### **The Ombudsman as an Intervenor**

27. Item 4 at Schedule 1: section 55ZGB provides options for the Ombudsman to determine how the investigation is to be conducted. In my view, an investigation of this nature, leaves the Ombudsman considerable scope to not investigate or discontinue an investigation without valid or defined reasons. The court may make orders with respect to the Ombudsman on application by the applicant (or at its own discretion), providing the opportunity for greater enforcement.

## Recommendation

28. At section 55ZGB(2), amend to include the following possible orders:
- The Applicant, on application to the court, may ask the court to make any one or more orders it considers appropriate, but not limited to:
- (a) the Ombudsman joined as an intervenor to the proceeding;
  - (b) the Ombudsman investigate a particular matter that the court considers necessary in relation to the Commonwealth’s model litigant obligations;

- (c) the Ombudsman complete the investigation within a prescribed period of time;
- (d) the Ombudsman provide a report on the outcome of the investigation, whether or not the investigation is completed, or the Ombudsman makes a decision not to investigate or discontinue the investigation;
- (e) a stay of proceeding or part of a proceeding during the investigation by the Ombudsman into the complaint.

### **Immunity from liability and limitations**

29. The applicant may require the Ombudsman to investigate a complaint into serious misconduct that may include perjury, contempt of court, perverting justice or other offences. The applicant should be given immunity from liability when making disclosures about Commonwealth officials, similar to the protections afforded under the PID Act. The Ombudsman is currently authorised to receive disclosures under the PID Act.<sup>15</sup>

### Recommendations

#### **30. 55ZGC Model litigant obligations: immunity from liability**

- (1) This section applies if a party to a proceeding (the **applicant**)<sup>16</sup> has made a complaint to the Commonwealth Ombudsman that a Commonwealth litigant, or a person acting for a Commonwealth litigant in relation to the proceeding,<sup>17</sup> has contravened or is likely to contravene the model litigant obligations in relation to the proceeding.
- (2) The Applicant is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the complaint to the Ombudsman.
- (3) Without limiting subsection (2), the applicant has absolute privilege in proceedings for defamation in respect of the complaint to the Ombudsman.

#### **31. 55ZGD Model litigant obligations: Liability for false or misleading statements etc. unaffected**

- (1) Section 55ZGC does not apply to civil, criminal or administrative liability (including disciplinary action) for knowingly making a statement that is false or misleading.
- (2) Without limiting subsection (1) of this section, section 55ZGC does not apply to liability for an offence against section 137.1, 137.2, 144.1 or 145.1 of the *Criminal Code*.

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<sup>15</sup> The sections proposed are based on wording used in section 10 and 11 of the PID Act.

<sup>16</sup> The recommended section to the Act uses (the **applicant**) similar to the current Bill for simplicity, notwithstanding recommendations in this submission to use an alternative word to describe an applicant.

<sup>17</sup> The recommended section to the Act uses the words “or a person acting for a Commonwealth litigant in relation to the proceeding” similar to the current Bill for simplicity, notwithstanding recommendations made in this submission to remove the wording if the definition of Commonwealth litigant is redefined.