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Mr Timothy Watling
Committee Secretary
Legal and Constitutional Affairs Committee
The Senate
Parliament House
CANBERRA

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Dear Mr Watling,

Inquiry into Judiciary Amendments (Commonwealth Model Litigant Obligations) Bill 2017

I refer to your letter of 13 December 2017.

As one of the largest litigation practices in South Australia and the State's largest criminal defence organisation, the Legal Services Commission appreciates the need for publicly funded agencies to act with the highest integrity.

The Common Law has a long-established principle that the Crown must comply with certain standards in the way it conducts litigation.¹ 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. In addition, under the Commonwealth *Judiciary Act 1913* the Federal Attorney-General has issued a Legal Service Direction commonly known as the Model Litigant Policy which specifies the Commonwealth Crown's obligations and provides redress for aggrieved litigants through complaint to the Attorney-General. The Policy is intended to work in conjunction with the Common Law principles.²

The Commission has some concerns about the proposed Bill which would introduce an investigative role for the Ombudsman where the Commonwealth has "contravened or is likely to contravene" the model litigant obligations in the course of litigation.

The primary role of an Ombudsman is the investigation of administrative action on behalf of a complainant. It is easy to imagine that any investigation of an active court case would quickly fall foul of the laws of evidence and contempt. Unlike the Attorney-General, the Ombudsman has no authority to direct the course of litigation taken on the Commonwealth's behalf. Investigations by an Ombudsman necessarily have their own

¹ For example: *Melbourne Steamship Company v Morehead*, per Griffith CJ, HCA (1912) 15 CLR 333,342.

² *ASIC v Rich*, (2009) 236 FLR 1m [527]

formalities and procedures and have the potential to delay any court matter for a considerable time causing further loss to the parties involved.

The Commission considers that the current Common Law and Model Litigant Policy provide appropriate avenues of redress for complainants.

Thank you for the opportunity to comment on this draft Bill.

Yours sincerely,

Gabrielle Z Canny
Director