



Law Council
OF AUSTRALIA

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

Senate Legal and Constitutional Affairs Legislation Committee

20 March 2018

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Society of Western Australia and the Law Society of South Australia for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee regarding the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017.
2. The Law Council acknowledges the importance of the Commonwealth maintaining proper standards in the way it undertakes legal work, including the way it conducts itself in litigation. The Law Council supports the standards to be observed by the Commonwealth, as set out in the *Legal Services Directions 2017 (Legal Service Directions)*, and in particular, the Model Litigant Obligations in Appendix B of the Directions.
3. The Law Council observes that the Legal Services Directions deal with two broad themes:
 - the first concerns administrative and governance matters such as: agency responsibilities for legal services, reporting on legal services expenditure and the legal work undertaken by agencies; the tied areas of Commonwealth legal work; assistance to Commonwealth employees for legal proceedings; procurement of legal services; and the power of the Attorney-General to impose sanctions for non-compliance with the Directions.
 - the second concerns litigation, including: efficiency and effectiveness; not starting litigation unless satisfied it is the most suitable method of dispute resolution; not starting litigation unless legal advice is received that there are reasonable grounds for starting proceedings; and the Commonwealth's obligation to act as a model litigant.
4. The proposed amendments to the *Judiciary Act 1903 (Judiciary Act)* seek to introduce statutory qualifications and controls over the proceedings and processes of the courts (and tribunals) in circumstances where a party to proceedings has lodged a complaint about the conduct of the Commonwealth and/or its advocates representing it in those proceedings to an (albeit statutorily independent) agency of the Executive (the Commonwealth Ombudsman).
5. The Law Council notes that the way litigation before the courts (and tribunals) is conducted is ultimately controlled and managed through the inherent powers of the courts to control the conduct of proceedings, the rules of the courts (and tribunals), the duties and other professional obligations of legal practitioners and the common law.
6. On the other hand, the primary purpose of the Commonwealth Ombudsman is to investigate actions that relate to matters of administration, and to report on his or her opinions concerning the matters investigated, including his or her opinion on how a matter might be addressed, corrected or remedied.¹
7. While the Law Council supports, as a matter of principle, the importance of effective mechanisms to ensure that the Commonwealth and its agencies comply with the model litigant obligation, the Law Council does not support the proposed amendments as an effective way of achieving this outcome.

¹ *Ombudsman Act 1976 (Cth)*, sections 5 and 15.

The Bill

8. The Bill proposes to amend the Judiciary Act to provide:

Proposed section 55ZGA - that where a party to a proceeding has made a complaint to the Commonwealth Ombudsman that a Commonwealth litigant, or a person acting for a Commonwealth litigant has contravened or is likely to contravene the model litigant obligations, the court may, on application and if it is of opinion that it is desirable to do so, order that the proceedings or part of the proceedings be stayed; and

Proposed section 55ZGB - that where the Commonwealth Ombudsman has dealt with a complaint (by completing an investigating or deciding not to investigate), by transferring the complaint (and an investigation is completed or it is decided to not investigate), and a minimum period of 60 days has passed since the time the complaint was made, the court may, on application, stay the proceedings subject to any orders it considers appropriate.

9. The Bill also proposes to amend the Judiciary Act to define the scope of the proposed regime by:

- inserting a definition of *Commonwealth litigant* in section 2 of the Judiciary Act to mean, in effect, legal services and related service provided by the Australian Government Solicitor, pursuant to subsection 55N(1) to: the Commonwealth; to a person suing or being sued on behalf of the Commonwealth; to a Minister of the Commonwealth; a body established by an Act or regulations, or by a law of a Territory; officers or employees of the Commonwealth or Territory body; persons holding office under Territory laws;
- inserting a definition of *model litigant obligations*;
- inserting a requirement that the Attorney-General *must* ensure there are Legal Services Directions applying generally to Commonwealth legal work that include model litigant obligations (except in criminal prosecutions and related proceedings); and
- removing the protection from actions available under subsection 55ZI((2) of the Judiciary Act for a person in relation to an act done or omitted by the person in compliance, or in good faith in purported compliance, with a Legal Services Direction, to be replaced with a protection that the person is not liable to an action of other proceeding for acts done or omitted in good faith and purported compliance with a Legal Services Direction.

10. The Bill also seeks to amend the *Ombudsman Act 1976* (Cth) (**Ombudsman Act**) to confer model litigant functions on the Commonwealth Ombudsman:

Proposed subsection 5B(1) – to declare that legal work performed by or for a Commonwealth litigant is, to the extent it relates to compliance with the model litigant obligations, is to be taken to be an action that relates to a matter of administration; and

Proposed subsection 5B(2) – that actions taken by the following classes are deemed to be actions taken by a prescribed authority:

- an action taken by a non-Commonwealth Department, prescribed authority and other persons; and
- an action taken by a Department or prescribed authority; but
- not action in relation to a commercial activity of the Commonwealth litigant; and
- not an action taken to be tax administration action within subsection 6D(1) of the Ombudsman Act.

Law Council comments

Legal Services Directions

11. Legal Services Directions made by the Attorney-General set out general standards and requirements applying to the Commonwealth's legal work.
12. Much of the Legal Services Directions deal with matters relating to the internal administrative arrangements of the Commonwealth for dealing with legal matters, and an independent inquiry into an alleged breach of these internal administrative matters is usually an issue for administrative review mechanisms.
13. The model litigant obligations are set out in Appendix B to the Directions. They are a mixture of administrative obligations and obligations about the approach to be taken to conducting of litigation.
14. 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.

Model litigant obligations

15. The common law recognises the public interest of the Crown dealing fairly with its subjects², in a way that serves to: protect the reasonable expectations of those dealing with public bodies that they will act honestly and fairly; ensure that public bodies exercise their powers for the public good; and require that public bodies act as moral exemplars.
16. These interests require the Commonwealth to act as a model litigant, and the courts will enforce the required standards, pursuant to their inherent powers to control the judicial processes of the court and to supervise and discipline legal practitioners as officers of the court.

² *Melbourne Steamship Co. Ltd v Moorehead* [1912] 15 CLR 333, per the observations of Griffith CJ [342].

17. Examples of the exercise of these powers by the court include:

- making a special cost order for breach of the duty: see, for example, *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 1568 at [18]; *Mahenthirarasa v State Rail Authority of NSW (No 2)* [2008] NSWCA 201 at [13-23];
- taking into account a breach of the duty in exercising a judicial discretion: see, for example, *SZRAJ v Minister for Immigration & Citizenship* [2012] FCA 1237 at [59]-[60];
- potentially, staying proceedings until a breach of the duty is remedied: see *ASIC v Hellicar* [2012] HCA 17 at [155];
- potentially, on appeal, where a breach of the duty has resulted in a miscarriage of justice, ordering a retrial: see *ASIC v Hellicar* [2012] HCA 17 at [155]; and
- permitting any necessary or appropriate amendment to a form of application filed, including any amendment necessary to ensure that the form of application names the correct parties on both sides of the record: see *Yong Jun Qin v the Minister for Immigration and Multicultural Affairs* [1997] FCA 495.

18. The Law Council considers that the model litigant principles set out in the Legal Services Directions are not in substance different to the common law duty. Importantly, the Legal Service Directions do not purport to be a code and the Commonwealth (and its agencies) remain bound by the common law duty, which has been said to be “broader and more fundamental”: see *Qantas Airway Ltd v Transport Workers Union of Australia* [2011] FCA 470 at [192].

19. It is also noted that a court would also have regard to its own Rules in forming a view about whether a contravention of the model litigant obligation would cause, or would likely cause, the administration of justice to be compromised, due to:

- complication or delay for the trial of the proceedings (consistent with rule 9.06 of the Federal Court Rules 2011);
- inconvenience to the proceedings (consistent with rule 9.06);
- prejudice, embarrassment or delay in the proceedings (consistent with rules 16.02(2) and 16.21(1));
- an abuse of the process of the court in the proceedings (consistent with rules 16.02(2) and 16.21(1)); or
- unnecessary or wasted costs in the proceedings (consistent with the costs discretion).

20. The Law Council considers that the proposed insertion of sections 55ZGA and 55ZGB into the Judiciary Act by the Bill does 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. 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.

Model litigant review functions of the Commonwealth Ombudsman

21. The proposed amendments expressly provide that the Commonwealth Ombudsman may enquire into alleged breaches of the model litigant obligations, and that a Court may (in its discretion) stay proceedings pending that enquiry.

22. While the Law Council supports, as a matter of principle, the importance of effective mechanisms to ensure that the Commonwealth and its agencies comply with the Legal Services Directions and the model litigant obligation, the Law Council does not support the proposed amendments as an effective way of achieving this outcome, for the following reasons:

- the Legal Services Directions themselves provide for oversight by the Office of Legal Services Coordination (**OLSC**) on compliance by Commonwealth entities with the Directions – the OLSC is arguably better placed to deal with systemic issues that might arise than the Commonwealth Ombudsman;
- the Court before which a matter is being litigated, and not the Commonwealth Ombudsman, is also better placed consider, and can adjudicate upon, alleged breaches of the model litigant obligations in the particular circumstances of the matter before the Court. As indicated previously, the courts have considerable inherent powers to control proceedings before the Court;
- an Ombudsman inquiry into the conduct of a party to pending (or even concluded) litigation raises the potential for that the inquiry to 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;
- a private litigant might use the express ability to complain to the Ombudsman and then to seek a stay of the proceedings as a strategy against the Commonwealth as a litigant including, for example, to distract attention by the Commonwealth and its lawyers from the conduct of the litigation;
- any report by the Ombudsman 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; and
- proposed section 55ZGB may provide an avenue for a complainant to raise before the Court matters of an administrative nature raised with and concluded by the Commonwealth Ombudsman, for re-examination by the Court in order for the Court to reach a view about whether its power to grant a stay of proceedings should be exercised. The Law Council notes that the Ombudsman Act does not provide such an avenue to review the opinions formed by the Commonwealth Ombudsman in other matters.

Complaints against legal practitioners

23. All lawyers undertaking legal work for or on behalf of the Commonwealth are expected to endeavour to meet the standards of a model litigant. Subsection 55E(2) of the Judiciary Act makes specific provision for the Attorney-General's lawyers, being enrolled legal practitioners to, when acting in the capacity of a lawyer, be entitled to:

- do everything necessary or convenient for the purpose of acting as a lawyer;
- practise as a lawyer in any court and in any state or territory; and
- all of the rights and privileges of practising as a lawyer.

24. Subsection 55E(3) provides that an Attorney-General's lawyer is not subject to a law of a state or territory relating to legal practitioners, except to the extent those laws impose rights, duties or obligations on legal practitioners in relation to their clients or to the courts; or provide for disciplinary proceedings in relation to the misconduct of legal practitioners.
25. In the Law Council's view, an Attorney-General's lawyer is therefore presently regulated in two ways:
- under state and territory legal profession laws in relation to their dealings with clients and the courts, and in the application of disciplinary regimes under those laws; and
 - under applicable Commonwealth legislation, regulations, rules and directions for all other matters.
26. The Law Council considers this separation is appropriate and should be maintained. The Law Council does not support amendments that would bring any of the above areas of activity into the scope of investigation and formulation of recommendations by the Commonwealth Ombudsman. The Law Council notes that this position is consistent with the scheme set out in section 6 to section 6E of the Ombudsman Act, which avoids duplication of complaints-handling by enabling the Commonwealth Ombudsman to decline to investigate (and transfer a complaint) where he or she is of opinion that the complaint could be handled more conveniently or effectively by an alternative, specific complaints-handling body.
27. In enforcing the model litigant obligations, Commonwealth litigants should not be at a special disadvantage, no more than they should be at a special advantage. That is, where there is a reasonable basis for doing so, they should be entitled to, for example, put a party to proof of a dubious or disputable proposition of fact or law, rely upon a limitation period and expect compliance with procedural rules.
28. The Law Council considers that 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.