

The Model Litigant Obligation and Advancing Your Client's Position

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Introduction

1. It is expected that “Governments and their emanations should be model litigants”.¹ There might be a common law duty of that nature;² there might be a statutory duty;³ there might be a policy-based duty.⁴ Whatever the source may be, it is commonly said that the model litigant obligation requires more of lawyers than mere compliance with ordinary legal rules and ethics.⁵ In other words, more is expected of lawyers acting for the Crown than lawyers acting for private clients.
2. All lawyers might at times be required to act contrary to their clients’ wishes or interests – after all, the duty to the Court prevails over the duty to the client. This paper briefly discusses the extent to which lawyers acting for the Crown might have additional obligations – first, by outlining how the model litigant obligation might affect the obligations of lawyers; and, second, by discussing some of the issues lawyers acting for the Crown might need to consider at different stages of litigation.

A solicitor’s obligations

3. Both Queensland⁶ and the Commonwealth⁷ have written statements of the model litigant obligation, which I will refer to as the Queensland Statement and the

¹ *Commissioner of Main Roads v Jones* [2005] HCA 27, [84].

² See Appleby, G., *The Government as Litigant* (2014) 37(1) UNSW Law Journal 94, 100; *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133, 342; *Kenny v State of South Australia* (1987) 46 SASR 268, 273; *Yong Jun Qin v Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155; *Scott v Handley* (1999) 58 ALD 373, 383; *Deputy Commissioner of Taxation v Young* (No. 2) [2017] NSWDC 294, [27].

³ *Judiciary Act 1903* (Cth), ss 55ZF and 55ZG; *Legal Services Directions 2017* (Cth).

⁴ Eg, Queensland *Model Litigant Principles*, <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>>.

⁵ See *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537, 558-559; *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366, 383-384.

⁶ *Judiciary Act 1903* (Cth), ss 55ZF and 55ZG; *Legal Services Directions 2017* (Cth).

⁷ Eg, Queensland *Model Litigant Principles*, <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>>.

Commonwealth Statement respectively. Those Statements describe the model litigant obligation as one falling on the Crown as (ie, the “State and all agencies must conduct themselves as model litigants” and the “Commonwealth’s obligation to act as a model litigant”). And it is the client, of course, who is the litigant – not the solicitor. So, how does the obligation translate into additional ethical obligations for solicitors?

4. The Commonwealth’s Statement includes this note (my emphasis):⁸

Ensuring compliance with the obligation is primarily the responsibility of the Commonwealth agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether AGS, in-house or private, will need to act in accordance with the obligation and to **assist their client agency to do so**.

5. Even if we assume that the model litigant obligation falls upon the client, not upon the solicitor,⁹ the flow on effect to the solicitor may be significant. Consider the following general obligations that a solicitor has under the *Australian Solicitors Conduct Rules 2012* (the **ASCR**):

- (a) “A solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty” (ASCR, s 3.1).
- (b) “A solicitor must not engage in conduct, in the course of practice or otherwise, which … is likely to a material degree to: be prejudicial to, or diminish the public confidence in, the administration of justice” (ASCR, s 5.1.1).
- (c) A solicitor must “act in the best interests of a client in any matter in which the solicitor represents the client” (ASCR, s 4.1.1).
- (d) “A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client’s and the instructing solicitor’s instructions where applicable” (ASCR, s 17.1).

⁸ Solicitors or barristers engaged by the Crown might also, via a costs agreement, be contractually bound to comply with (or assist compliance with) the model litigant obligations.

⁹ Which is not a safe assumption: eg, *Judiciary Act 1903* (Cth), ss 55ZF and 55ZG.

- (e) “A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement” (ASCR, s 7.1).
 - (f) “A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation” (ASCR, s 7.2).
6. Sticking with the shaky assumption that the model litigant obligation falls upon the client, not the solicitor, a solicitor acting for the Crown probably still has (at least) the following duties:
- (a) A duty to advise the client to comply with, and how to ensure compliance with, the model litigant obligation.
 - (b) A duty to make independent forensic judgments which give effect to the model litigant obligation.
7. These duties may impact on a solicitor’s obligations at various stages of litigation.
- Commencing legal proceedings**
8. A solicitor would, no doubt, decline instructions to commence legal proceedings that the solicitor considers to be baseless or vexatious. Indeed, a solicitor is probably obliged to decline instructions to commence legal proceedings if the solicitor considers that the claim would be “plainly unarguable”.¹⁰ Generally, however, if a claim is at least arguable, even if only barely arguable, then the solicitor is entitled to act.¹¹
9. The model litigant obligation gives rise to additional considerations for solicitors acting for the Crown (including, or perhaps especially, solicitors employed in-house). The

¹⁰ *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683.

¹¹ Ibid. This might, of course, be affected by specific statutory requirements.

Commonwealth Statement provides that a “non-corporate Commonwealth entity is not to start court proceedings unless the entity has received written legal advice ... indicating that there are reasonable grounds for starting the proceedings”. Both the Queensland and Commonwealth Statements prohibit the Crown from “pursuing appeals unless [it] believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest”. Both Statements also incorporate the principle that the Crown should endeavour to “avoid ... legal proceedings wherever possible”, which suggests that commencing legal proceedings should be a last resort.

10. Having regard to those principles, and the general duties outlined above, a solicitor engaged for the Crown for the purpose of commencing legal proceedings should consider and give the client advice about (at least) the following:¹²
 - (a) Ways in which the client might pursue its objectives instead of commencing a proceeding.
 - (b) Whether all appropriate alternative dispute resolution processes have been engaged, or how the dispute might be resolved using such processes.
 - (c) The prospects of establishing the factual matters necessary for the proceeding to succeed.
 - (d) The prospects of establishing any contentious legal principles that will arise in the proceeding.
 - (e) The suitability of the case as a ‘vehicle’ for achieving the client’s legitimate objectives.¹³
 - (f) Whether commencing the proceeding would be consistent with the client’s model litigant obligation.

12 The *Legal Services Directions 2017* (Cth) prevents the Commonwealth from commencing proceedings unless it has “advice from lawyers ... indicating that there are reasonable grounds for starting the proceedings” (Sch 1, cl 4.7) and from “pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest” (Appendix B, cl 2(h)). The *Model Litigant Principles* (Qld) prevent Queensland entities from “pursuing appeals unless the State believes that it has reasonable prospects for success, or the appeal is otherwise justified in the public interest”.

13 Eg, *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 and *Director-General of Social Services v Hangan* (1982) 70 FLR 212.

- (g) If the proceeding is to be commenced, what approach should be taken to the other party's legal costs.¹⁴
11. It remains, of course, for the client to decide whether or not to commence a proceeding. However, if a solicitor formed a considered opinion that commencing the proceeding would be inconsistent with the client's model litigant obligation, then the solicitor would need to carefully consider the question of whether it is appropriate to accept instructions to act in the matter. An in-house solicitor would need to consider escalating the issue to a more senior level or other methods of addressing the concern.
12. I do not encourage any timid approach when considering these issues, but I do encourage a careful and structured approach to ensure that the client is given clear and timely advice that will assist it to comply with its model litigant obligation.

Settling / compromising legal proceedings

13. Solicitors are generally duty-bound to "inform the client ... about the alternatives to fully contested adjudication of the case which are reasonably available",¹⁵ and mediation and similar processes are commonly either a prerequisite or adjunct to litigation.¹⁶ According to both the Queensland and Commonwealth Statements, the model litigant obligation includes:
- endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
14. This indicates that, where litigation cannot be avoided, the client must (where appropriate) participate in alternative dispute resolution with a view to at least limiting the scope of the litigation. The starting point, then, would be that a solicitor acting for the Crown in litigation should consider and give the client advice about (at least) the following:

14 The Crown is not, of course, precluded from seeking costs; but, nor is it obliged to always seek its costs. The Commonwealth Statement recognises that in some cases, it might be appropriate for the Crown to pay the other party's costs regardless of outcome.

15 ASCR, 7.2. There is an exception to that duty where the client already understands those alternatives.

16 See, eg, *Civil Proceedings Act 2011* (Qld), Part 6; *Civil Dispute Resolution Act 2011* (Cth).

- (a) What alternatives to fully contested adjudication are available.
 - (b) Whether it is appropriate for the client to participate in alternative dispute resolution processes, and if not why not.
 - (c) How alternative dispute resolution processes might be used to limit the scope of the proceeding.
 - (d) What concessions (of fact or law) the client should make.¹⁷
15. It would, in my opinion, be inappropriate to simply assume that certain categories of litigation (such as judicial review) are not appropriate or amenable to alternative dispute resolution. Some types of ‘public law’ litigation might require a more creative or concerted effort, but there remains an obligation to actively consider and attempt alternative dispute resolution processes that might at least limit the scope of such proceedings.
16. Further, both the Queensland and Commonwealth Statements require that:
- (a) When participating in alternative dispute resolution processes, its representatives must do so “fully and effectively”; and
 - (b) Those representatives must “have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute”.
17. That seems to require that a representative¹⁸ of the Crown should directly participate in the relevant process and that the representative must have sufficient authority to give concessions and consent to orders or agreements that would finalise the matter. It follows that a solicitor acting for the Crown in an alternative dispute resolution process should advise the client of that obligation and insist upon compliance with the obligation.

17 For example, any standing or standard instruction to deny liability should raise significant concerns.

18 Not merely its solicitor; or, if a solicitor is the sole representative, that person would need decision-making authority.

Prosecuting / Defending legal proceedings

18. The Queensland Statement adopts what it calls “principles of firmness”, which include:

- (a) Appropriately testing all claims.
- (b) Contesting all spurious or vexatious claims.
- (c) Seeking security for costs where appropriate and pursuing costs when it is successful in litigation.
- (d) Acting properly to protect the State’s interests.

19. The Commonwealth Statement includes the following:

The obligation does not prevent the Commonwealth and Commonwealth agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and Commonwealth agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute.

...

The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

- 20. Whilst an approach of “win at all costs” would be inappropriate, the Crown has a genuine interest in upholding its policies and discretionary decisions made in pursuit of those policies. It also has a genuine interest in matters such as protecting public revenue, and securing convictions or the imposition of penalties in appropriate cases. An agency of the Crown, however, “has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve”.¹⁹
- 21. Once it is determined that the client will prosecute or defend a proceeding, the next question is how that should be done within the model litigant framework. The guiding

¹⁹ *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 and see *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90.

principle is perhaps what Griffiths CJ described over a century ago: “the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects”.²⁰ It is impossible to be definitive about what this obligation encompasses, but some of the more concrete matters that a solicitor should consider and address with the client would include:²¹

- (a) That technical points of pleading or procedure should not be taken against the other party (at least in situations where no substantial prejudice follows).
 - (b) That the client should ensure meticulous compliance with procedural requirements and time limits.
 - (c) That the client should not take advantage of its own default, and should ensure that any such default is drawn to the Court’s or other party’s attention.
 - (d) That all allegations or assertions in pleadings and other documents are accurate and well founded.
 - (e) That all relevant evidence (whether to the client’s benefit or otherwise) should be disclosed (or identified so that, if contentious, its disclosure can be considered by the Court).²²
 - (f) That the evidence placed before the Court should disclose the full circumstances (not leaving incomplete pictures or impressions).²³
 - (g) That the Court’s attention should be drawn to any arguments favourable to the other party that it appears the Court has overlooked.²⁴
 - (h) That the client should review its position on questions of fact and law as the case develops so as to make appropriate concessions or to attempt settlement.
22. Further, a solicitor appearing in Court for the Crown will need to make independent forensic judgments that are consistent with the model litigant obligation. This might

20 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

21 See Appleby, G., *The Government as Litigant* (2014) 37(1) UNSW Law Journal 94, 106-108.

22 See *Carlos v Minister for Immigration and Multicultural Affairs* (2001) 183 ALR 719, [53]-[55].

23 See *Australian Competition and Consumer Commission v Apple Pty Ltd (No 3)* [2018] FCA 617, [32].

24 See *SZLPO v Minister for Immigration and Citizenship [No 2]* (2009) 177 FCR 29.

include, for example, drawing the Court's attention to the client's default during a hearing (regardless of whether the client has consented to that approach). In appropriate circumstances, it might include the solicitor drawing the Court's attention to evidence or arguments favourable to the other party or adducing evidence favourable to the other party.

Costs orders

23. The model litigant obligation is no impediment to the Crown seeking an order that costs follow the event, and it is no impediment to the Crown enforcing a costs order against the other party (or, in appropriate cases, seeking security for costs).
24. There will, however, be cases where it would be inappropriate for the Crown to seek costs against the other party.²⁵ There might also be cases where it is appropriate for the Crown to pay the other party's costs regardless of the outcome. The clearest example might be where the Crown is pursuing (or defending) a proceeding for the purpose of it being a 'test case' (ie, to clarify or establish some principle of law). In such situations, the solicitor ought to advise the client about the appropriateness of seeking costs against the other party, and whether the client should consider paying the other party's costs.

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²⁵ See, generally, *Ruddock v Vadarlis* (2001) 110 FCR 491.