

MODEL LITIGANT GUIDELINES

and their intersection with the Latimer House

Principles:

Government's duty to uphold the Rule of Law and act with complete propriety and fairness as litigants

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Model Litigant Guidelines

What are they?

- Based on the Government's common law responsibility to act as model litigants.
- Requires the State and its agencies to act with complete propriety, fairly and in accordance with the highest professional standards.
- Recognized by the Court: **Sebel Products v Commissioners of Customs and Excise [1949] 1 Ch 409** in criticizing the government's technical defence in a tax case:

"At the same time, I can't help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to these which the courts, which derive their authority from the same source and fountain, impose on the officers under their control...."

- Sets standards for how the State should behave as a party to legal proceedings.

Model Litigant Guidelines

- Intention of Guidelines is to maintain proper standards in litigation.
- Consistent with Civil Procedure Rules (UK 1998, EC 2000, Jamaica 2006)
- Applies to litigation including before the courts, tribunals, inquiries and arbitration involving State departments and agencies as well as officers and ministers where the State provides full indemnity in actions for damages brought against them personally.

CIVIL
PROCEDURE

Volume 1



Model Litigant Guidelines

& the Common Law

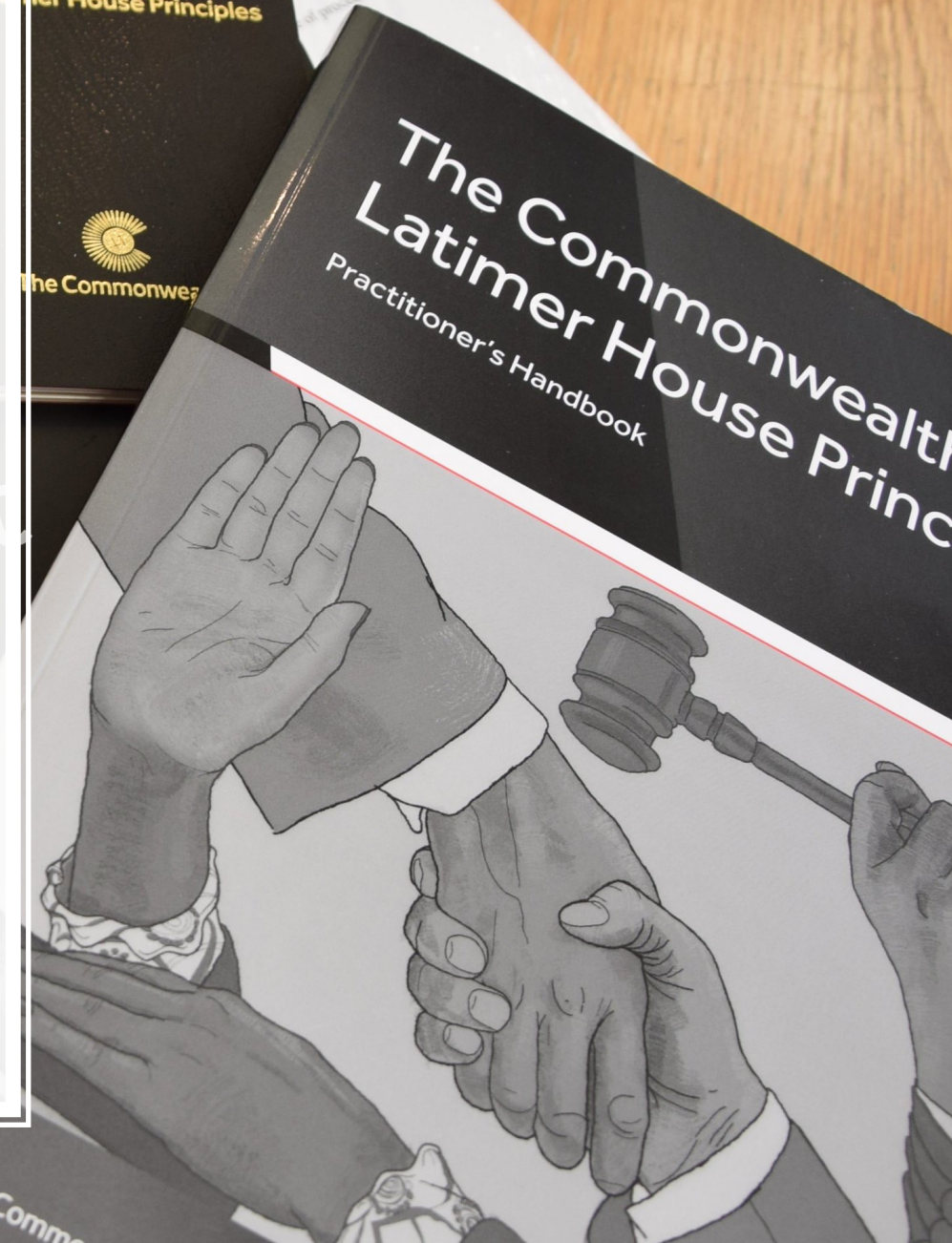
- Common law roots “old fashioned tradition, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects” - Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333; 18 ALR 533
- Chief Justice King of the South Australian Supreme Court in Kenny v State of South Australia (1987) 46 SASR 268

“The Court and the Attorney General, to which the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct of and disposal of litigation, It is extremely important that the Crown Solicitor’s Office set an example to the private legal profession as to conscientious compliance with the procedures designed to minimize cost and delay.”
- At common law there has always been a focus on fair procedure leading to a fair outcome
- Expectation is that a government will deal honestly and fairly with its citizens and discharge its powers for the public good. It is often better resourced than private litigants. Therefore, to act as the moral exemplars throughout the litigation process
- Common law has not always been clear, so the Guidelines have tried to present a written policy to provide clarity and guidance on what conduct is required of a model litigant.

LATIMER HOUSE PRINCIPLES

- The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.
- Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.
- Latimer House Principles are designed to help the business of fair, efficient, transparent, responsive government - government for the people. The confidence, belief and trust that people have in their government is the ultimate litmus test.
- The role played by judges and lawyers in a healthy democracy is part of the Model Litigant Guidelines' reason d'être.
- **One principle – VII (c) Judicial Review**

“Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice. ”



Latimer House Principles

- The Model Litigant obligations are consistent both with the Latimer House principles and broadly the RULE OF LAW.
- WHY THEN HAVE SO FEW COUNTRIES HAVE LEGISLATED OR MADE A WRITTEN POLICY?
- The Model Litigant obligations aim to meet so many potential deficiencies in the administration of justice as are experienced across the Commonwealth
- In the Commonwealth Caribbean, administration of justice is plagued with:
 - Delays
 - Backlog of court cases
 - Imbalance of litigation power
 - Inequality of arms
 - Significant litigation against the State
 - Growing number of judicial review claims
 - In Jamaica litigation for personal injury resulting from accidents involving State owned motor vehicles, usually uninsured
 - Litigation for torts related to malicious prosecution and/or false imprisonment
 - Still plagued by a tortuous journey through the civil courts. Introduction of the Civil Procedure Rules have not universally improved the demonstration of justice in dealing with cases expeditiously, proportionately and given resources especially that of court time.



The Overriding Objective

- The Court must deal with cases justly. This means:
 1. ensuring, so far as is practicable, that the parties are on an equal footing.
 2. saving expense.
 3. dealing with cases in ways which are proportionate to the –
 - amount of money involved;
 - importance of the case;
 - complexity of the issues; and
 - financial position of each party.
 4. ensuring that it is dealt with expeditiously.
 5. allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The Obligations

Overarching duty to act honestly, fairly, with complete propriety and in accordance with the highest professional standards

- Dealing with claims promptly
 - Minimizing delays in proceedings
 - Making an early assessment of the prospects of success and potential liability in claims
 - Provide preliminary advice as soon as possible
 - Paying legitimate claims without litigation
 - Admitting liability and running a trial on quantum only
 - Acting consistently in the handling of claims and litigation
 - Endeavoring to avoid, prevent or limit the scope of litigation and participating in ADR where appropriate
 - Example – Serve offers to settle, be open to ADR, initiate early mediation or settlement where no viable defences
 - Minimizing costs in litigation
 - Example – Serve Calderbank offers
 - Not taking advantage of a claimant who lacks 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 of success or the appeal is otherwise justified in the public interest
 - Apologizing when the government or its lawyers have acted wrongfully or improperly
 - Compliance with court rules and procedures regardless of competing demands or resourcing. Lack of resources is not an answer to a delay in compliance with a court timetable

The Model Litigant

WHAT
ARE YOUR
OBLIGATIONS?

- The obligation to act as a model litigant extends beyond merely obeying the law and abiding by the ethical obligations which apply to legal practitioners. Those are minimum standards of conduct.
- The Model Litigant obligations involve striving for more **aspirational** standards of the highest character.
- Government lawyers conduct must be above reproach and be seen to be above reproach.

"In conducting litigation government lawyers should act in an exemplary fashion and in a manner indicative of those standards that lawyers representing private litigants should seek to emulate." GA Del Pont, Lawyer's Professional Responsibility in Australia, (2006, Thomson) 296-297

The Model Litigant

Who does it apply to?

- It has been said that the Model Litigant principle applies to statutory authorities including when they are engaged in commercial activities.
- The principle has been held to bind:
 - the State, when engaged in commercial litigation
 - a State when engaged in common law litigation
 - a Minister respondent to a judicial review application
 - the Secretary of a Department respondent to an appeal against a decision
 - regulators engaged in enforcement proceedings
 - Directors of Public Prosecutions engaged in recovery of proceeds of crime
 - a Commission of Inquiry
 - Local government authorities.

Examples of Model Litigant Requirements

Compliance with case management

- The common feature of case management techniques is that obligations are placed on each party to litigation to take defined steps in accordance with a defined timetable.
- The obligation to behave as a model litigant extends to an obligation to comply with the requirements imposed through case management.
- The Courts do not accept that non-compliance can be excused because of funding difficulties for government parties:
- In a case of a kind where the Crown was regularly not ready on the first return date, King CJ in the South Australian Supreme Court said (**Kenny v State of South Australia (1987) 46 SASR 268 at 273**):

The Crown Solicitor, who appeared before me....referred to staffing difficulties. ...The Court and the Attorney General, to whom the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct and disposal of litigation. It is extremely important that the Crown Solicitor's office sets an example to the private legal profession as to conscientious compliance with procedures designed to minimize cost and delay and make maximum use of the resources committed to the court. The court cannot, of course, influence those who are responsible for staffing levels in the Crown Solicitor's office. I must point out, however, that pressure of work and lack of staff is not accepted from the private profession as an excuse for non-compliance with the Rules and it cannot be accepted from the Crown Solicitor's office.

The Court could not tolerate a situation in which litigants were delayed because the opposite party was the State in a way which would not be tolerated if the opposite party were a private litigant. The courts have criticised strongly a government party which had failed to meet court ordered timetables by reason of inadequate attention to the conduct of matters. This extended to matters where delays have been caused through a failure to make timely requests to obtain evidence from overseas. (Challoner v Minister for Immigration and Multicultural Affairs (No 2) [2000] FCA 1601)

- Where there is a failure to meet a timetable required by Court rules or Order the model litigant principle requires the government party to make full and frank disclosure of that fact to the court and the other side. That obligation is particularly to be complied with when the other side is not represented by a lawyer. - **Scott v Handley (No 2) [1999] FCA 404**

Examples of Model Litigant Requirements

Avoidance of technical points

- As Melbourne Steamship Co Ltd v Moorehead demonstrates the principle obliges government parties not to take purely technical pleading points. In a more recent example, the Full Federal Court commented on a submission by a government party that an application was incompetent because it failed to name the correct respondent:

“Before dealing with the question raised, we are bound to say that we share Hill J's reaction that an injustice was involved as a result of the taking of this point by the Crown. That is the more to be regretted when the point is taken by a party which is expected to act, and to be seen to act, as a model litigant.”

TRUE ADMINISTRATION OF JUSTICE

Examples of Model Litigant Requirements

Government Party's duty to assist the administration of justice

- In **P & C Cantarella Pty Ltd v Egg Marketing Board** Mahoney J (as he then was) said:

"The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result. [emphasis added]"

....

This is, perhaps, merely one aspect of what was described by Griffith C.J., in Melbourne Steamship Co. Ltd. v. Moorehead as "the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary."

- The obligation articulated by Mahoney J has been read as extending to the imposition of an obligation to assist the Court to come to the correct view on questions of law, most particularly when the other side is not represented, or poorly represented.

Examples of Model Litigant Requirements

Government Party's duty to assist the administration of justice

- The case of **Mahenthirarasa v State Rail Authority of New South Wales (No 2)** illustrates what the courts expect in terms of receiving assistance from the Executive branch.
 - The applicant sought to appeal to the Appeal Panel of the NSW Workers Compensation Commissions. The Authority persuaded a registrar of the Commission to refuse to permit the appeal to proceed on the basis that certain statutory preconditions had not been met.
 - The applicant challenged the registrar's decision unsuccessfully to the Supreme Court of NSW and then successfully to the Court of Appeal. In both courts the Authority filed a submitting appearance save as to costs by which it neither consented to nor opposed the orders sought by the applicant.
 - CA found it was inappropriate for the Authority to file a submitting appearance and thereby deprive the court of the assistance of the executive branch.
 - After reviewed the authorities Basten JA had this to say –

“On the appeal, this Court expressly invited the State Rail Authority to reconsider its position and provide assistance to the Court. It declined to do so. Again, it should be assumed that, upon the institution of the appeal, the SRA gave consideration as to whether it should actively defend the benefit it had obtained from the lower Court or concede that the judgment should fairly be set aside. Whatever the view that was formed, on appropriate advice, this Court did not have the assistance which might have been offered consistently with the view adopted by the SRA. The principles applicable to a model litigant required it to deal with claims promptly, not to cause unnecessary delay, to endeavour to avoid litigation wherever possible, not to resist relief which it believes to be appropriate and not to decline to provide appropriate assistance to the court or tribunal whether expressly sought or not. It is probable that those principles were not applied.”

Examples of Model Litigant Requirements

Government Party's duty to assist the administration of justice

- The application of the principles might even require the model litigant to act in a manner adverse to the interest of the government.
- In **SZLPO v Minister for Immigration and Citizenship (No 2) (2009) 255 ALR 435** at [4] the Minister's solicitor informed the associate of the presiding judge that the Court had overlooked one of the appellant's grounds of appeal. The Court set aside its earlier orders, proceeded to consider the overlooked ground and in the result, reversed its decision. The Court expressed its gratitude to the Minister's solicitor for bringing the oversight to the Court's attention and commended her for acting as a model litigant.
- By acting as a model litigant, the Minister put at risk and ultimately lost the benefit of a judgment in his favour. However, public body has no legitimate private interest. Therefore, compliance with model litigant obligation was not injurious to the interests of the Minister but one which compliance with the obligation served the broader interests of justice.

Examples of Model Litigant Requirements

Duty not to impose unfair burden

- Tailor claims with care to the precise needs of the case.
- If defendant, to consider carefully which matters to dispute when filing a defence.
- In **Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning [2009] NSWLEC 155** is one which the court found that a materially incorrect assertion made in a pleading gave rise to a breach of the obligation. The Minister had filed a joint defence with the Director General of the Department of Planning in which it was asserted that a particular project comprised critical infrastructure for the purposes of the applicable legislation.
- The Court found that the assertion caused the plaintiff to believe that it was necessary to continue the proceedings to preserve its rights to challenge the approval of the project. However, documents subsequently produced disclosed that when the defence was filed the Director General considered that the project did not comprise a critical infrastructure and that the Minister was yet to form a view on the matter.
- The Court criticized the conduct of the government defendants in filing their defence as misconduct, unreasonable and a departure from the standards expected of a model litigant.

TAX CASES

- Taxpayers need to be confident that the tax laws will be administered fairly.
- Tax laws are complex and uncertain. “Opening the Tax Acts is like entering the door to a parallel universe”
- Notwithstanding the complexity, the responsibility for understanding and applying the tax system falls on the least able to do so: the taxpayer who neither created nor administers the system.
- Based on self-assessment, the responsibility for getting their assessments corrects is imposed on the taxpayers.
- A taxpayer must lodge a tax return and make his/her assessment of taxes within a few months of year end. The tax authorities have up to seven years to check the assessment and if they think it is wrong, to issue an amended assessment. In issuing an amended assessment interest is imposed from the date of the taxpayer’s tax return was due and in addition, there may be penalties.
- The amended assessment is subject to objection rights and to appeal rights in the courts. The cost of litigating a dispute with the tax authority is far beyond the reach of the vast bulk of taxpayers and only open to wealthy or big business.
- The tax authority is perceived as all powerful and this perception is often the reality
- In this environment it is essential that taxpayers believe that the authority will administer the system fairly
- Essential to the administration of justice that the agency operates on Model Litigant Rules, which seek to impose fairness.
- Tax authority should not be seen as seeking to interpret the law to get the maximum tax. An air of neutrality should be maintained as the tax authority has no private interest.
- This area is a very good example where there is significant imbalance of power between the government agency – TAJ- and the taxpayer. They have access to considerable resources, greater power to compel people to provide information, greater experience and expertise in dealing with complex tax matters. For that reason, it is vital that the government agency should behave ethically, fairly and honestly and model best litigation practice.



What is the Implication of the Cost on Public Funds

Reporting & Enforcement

Are the Rules enforceable?

- Model Litigation Rules act as a safeguard against broad power (and the imbalance) and provide the public with confidence that the laws will be administered fairly
- The agencies themselves are responsible for enforcing the model litigant policy
- Attorney General has the ultimate responsibility for non-compliance and can impose sanctions
- Obligation is an ethical requirement rather than a legal standard in litigation
- Guidelines where legislated do not give the court to enforcement. Courts can only hold government legal officers accountable through judicial criticism.
- Perhaps to be taken into account when determining questions of costs
- In Australia the Attorney General's Department (through its Office of Legal Services Coordination OLSC) publishes statistical data on breaches of the Directions
- Are complaints being investigated and dealt with transparently?
- There is no data as to the details/nature of the complaints made and how they are resolved
- For example INDIA - According to the Ministry of Law and Justice, government departments are a party to around "46 percent" of court cases
- the number and nature of writ petitions filed before a High Court are indicative of the extent of friction between citizens and the government; it gives an idea about the violation of individuals' rights, breach of contracts and abdication of obligations on part of the state etc.

CASE STUDY: Breach of Model Litigant Guidelines

Walpole v Secretary, Department of Communities and Justice [2020] FamCAFC 65 (25 March 2020)

- Decision by the Full Court of the Family Court of Australia allowed an appeal against orders made requiring two children aged 3 and 2 to return to New Zealand
- Involved interpretation of the Child Abduction Regulations which give effect to the Hague Convention on the Civil Aspects of International Child Abduction in Australia
- The first instance judge found the conditions for the return of the children to their father in New Zealand as prescribed by the Regulations were satisfied, notwithstanding that the father had a known and lengthy criminal history and that the children had lived with and been exposed to family violence.
- Case took place during COVID when there were strict international travel restrictions in place and Australians were subject to do not travel ban

“We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to the Model Litigant Guidelines. The NSW Guidelines, which apply to the Central Authority requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in accordance with the highest professional standards. Relevantly, this includes not requiring the other party to prove a matter which the state or agency knows to be true.

The Central Authority should have enquired into and divulged the father’s criminal record in Australia and New Zealand, rather than requiring the mother and the Independent Children’s Lawyer to present that information and essentially require the other party to prove a matter which the state or agency knows to be true.

Instead, it was left to the mother and the ICL to gather records from NZ and domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious.”

Considerations should be given to the powers of the Central Authority to refuse to present an application.”

CASE STUDY: Breach of Model Litigant Guidelines

Walpole v Secretary, Department of Communities and Justice [2020] FamCAFC 65 (25 March 2020)

- The Applicant had the onus of convincing the Family Court that the children's removal from NZ was wrongful. The Court of Appeal commented that they were troubled by what occurred in the case. They highlighted the need for government agencies to act with complete propriety and in accordance with the highest professional standards. The judges were critical of the Respondent agency for failing to disclose certain information about the father's criminal history that it was aware of, thus effectively forcing the Appellant mother to have to go to the trouble and expense of obtaining the father's records from overseas especially where the appellant was on a limited income.
- What happened is exactly the sort of scenario which the Guidelines seek to avoid. They failed to keep the costs of litigation to a minimum. It resulted in their taking advantage of an opponent who lacked the resources to litigate a legitimate claim.
- It raises the question of what should happen when the judiciary make a negative comment about the conduct of a particular agency in court proceedings.

Case Studies

- FC of T v Indooroopilly Childcare Services (QLD) Pty Ltd
the Court was extremely critical of the Australian Tax authority's failure to follow a series of federal court decisions
- In – LVR (WA) Pty Ltd v Administrative Appeals Tribunal (2012) 203 FCR 166 the Court was critical of the Counsel for not advising the first instance judge that the Appeal Tribunal's reasons for its decision were almost wholly copied verbatim from the Commissioner's submissions.
- Since it is based on complete propriety and honesty with the court, government lawyers should avoid traditional litigation "strategies" or "tactics". If opposing party fails to raise a critical issue, it is incumbent on the model litigant to raise such an issue, even if it is adverse to its case.



HOW CAN LITIGANTS ENSURE THAT GOVERNMENT BODIES ARE ABIDING BY THE MODEL LITIGANT OBLIGATIONS?

*(even where they are not
enshrined in a written policy
document)*

- Litigants cannot take steps to enforce a Direction. In Australia, the legislation (s55ZG of the Judiciary Act 1903) provides that compliance is not enforceable except by or upon the application of the Attorney General and that the issue of noncompliance with a direction may not be raised in any proceeding except by, or on behalf of the Commonwealth.

THANK YOU!

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