Model Litigant Policy for Civil Litigation

1. Introduction

1.1 The Model Litigant Policy has been adopted to assist in maintaining proper standards in litigation and the provision of legal services in NSW. The Model Litigant Policy is a statement of principles. It is intended to reflect the existing law and is not intended to amend the law or impose additional legal or professional obligations upon legal practitioners or other individuals.[1]

1.2 The Model Litigant Policy applies to civil claims and civil litigation (referred to in this Policy as litigation), involving the State or its agencies including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes.

1.3 Compliance with the Model Litigant Policy is primarily the responsibility of the Head of each individual agency in consultation with the agency's principal legal officer. In addition, lawyers, whether government or private, are to be made aware of the Model Litigant Policy and its obligations.

1.4 Issues relating to compliance or non-compliance with the Model Litigant Policy should attempt to be resolved between the parties in the first instance, and then are to be referred in writing to the Head of the agency concerned.

1.5 The Head of each agency may issue guidelines relating to the interpretation and implementation of the Model Litigant Policy.

1.6 The Model Litigant Policy supplements but does not replace existing Premier's Memoranda and policies relating to Government litigation, in particular:

- M1997-26 - Litigation Involving Government Authorities
- M1995-39 - Arrangements for Seeking Legal Advice from the Crown Solicitor's Office
- NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Abuse.

2. The obligation

2.1 The State and its agencies must act as a model litigant in the conduct of litigation.

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[1] It should be noted that clause 2 of Schedule 2 of the *Legal Profession Uniform Law Application Act 2014* provides that a law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

3. Nature of the obligation

3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State and its agencies will act as a model litigant has been recognised by the Courts.[2]

3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;

c) acting consistently in the handling of claims and litigation;

d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to the NSW *Civil Procedure Act 2005* which provides that the overriding purpose of the Act is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings;

e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

I. not requiring the other party to prove a matter which the State or an agency knows to be true; and

II. not contesting liability if the State or an agency knows that the dispute is really about quantum;

f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;

g) not relying on technical defences[3] unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum M1997-26 - Litigation Involving Government Authorities;

h) in accordance with Principle 10 of the *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sex Abuse*, State agencies

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[2] See, for example, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *Kenny v South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 and *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 247 CLR 345.

[3] A 'technical defence' is commonly understood to be a defence that 'lacks all substantive merit and is supportable only on a narrow or literal appreciation or interpretation that is at odds with clear reality': *Liao v New South Wales* [2014] NSWCA 71 at [356]. Statutory defences available to government parties, such as defences under Part 5 of the *Civil Liability Act 2002* (NSW) or "good faith" defence provisions are not considered to be technical defences. Where appropriate, such defences should be pleaded.

may not rely on a statutory limitation period as a defence in civil claims for child abuse;[4]

i) when settling civil claims agencies should consider the use of confidentiality clauses in relation to settlements on a case by case basis;

j) only undertaking and pursuing appeals where the State or an agency believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable;

k) apologising where the State or an agency is aware that it has acted wrongfully or improperly; and

l) providing reasonable assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

3.3 The State or an agency is not prevented from acting firmly and properly to protect its interests. The obligation does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

3.4 In particular, the obligation does not prevent the State or an agency from:

a) enforcing costs orders or seeking to recover costs;

b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;

c) pleading limitation periods (other than in child abuse actions);

d) seeking security for costs;

e) opposing unreasonable or oppressive claims or processes;

f) requiring opposing litigants to comply with procedural obligations; or

g) moving to strike out or otherwise oppose untenable claims or claims which are an abuse of process.

[4] See also section 6A of the *Limitation Act 1969* which came into effect on 17 March 2016.