Reforming the Commonwealth's Model Litigant Obligations: Addressing Challenges and Enhancing Ethical Litigation

Dr Jason Donnelly*

Despite obligations to act with the highest integrity, fairness, and professionalism, the Commonwealth of Australia's role as a model litigant faces significant limitations. This article critically examines these challenges, highlighting issues such as the unenforceable nature of the model litigant rules, ambiguities causing inconsistent application, conflicts between fair conduct and protecting state interests, insufficient training for legal practitioners, lack of penalties for breaches, and difficulties in monitoring compliance. To enhance effectiveness, the article proposes reforms including enforcing penalties for non-compliance, clarifying guidelines, mandating training for legal representatives, improving monitoring and reporting mechanisms, emphasising alternative dispute resolution, establishing a complaint process for aggrieved parties, and addressing power imbalances in litigation involving the state. By implementing these recommendations, the Commonwealth can better fulfil its role as a model litigant, ensuring ethical conduct, reinforcing public trust in the legal system, and promoting more equitable dispute resolution.

Introduction

The Commonwealth of Australia, as a sovereign entity, holds a unique position in legal proceedings, bearing both immense authority and profound responsibility.[1] Central to this responsibility is the obligation for the Commonwealth and its agencies to act as model litigants – a principle demanding the highest standards of integrity, fairness, and professionalism in all litigation matters.[2] This obligation is not merely a call for adherence to legal and ethical norms but an expectation to exceed them, ensuring that justice is not only done but seen to be done.[3]

Despite the clear articulation of these obligations, significant limitations hinder their practical effectiveness. The model litigant rules, while comprehensive in scope, lack legal enforceability, rendering them non-justiciable and often leaving aggrieved parties without direct remedies in instances of breach. Ambiguities within the rules' language lead to subjective interpretations and inconsistent applications across various cases and agencies. Furthermore, a tension exists between the Commonwealth's duty to act fairly and its imperative to vigorously protect its interests, sometimes resulting in aggressive litigation strategies that conflict with the spirit of the model litigant obligations.

This article examines the statutory regime governing the Commonwealth's role as a model litigant, critically analyses the inherent limitations of the current framework, and explores the implications of these shortcomings on the justice system. The article highlights the challenges faced in ensuring consistent compliance and the resultant impact on fairness and public confidence.

* Senior Lecturer, Western Sydney University; Barrister-at-Law.

[1] Peter Gerangelos, "The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative" (2012) 12(1) *Oxford University Commonwealth Law Journal* 97.

[2] Adrian Zuckerman, "A Reform of Civil Procedure: Rationing Procedure Rather Than Access to Justice" (1995) 22(2) *Journal of Law and Society* 155.

[3] Anne Richardson Oakes and Haydn Davies, "Justice Must Be Seen to Be Done: A Contextual Reappraisal" (2016) 37 *Adelaide Law Review* 461.

THOMSON REUTERS

© 2024 Thomson Reuters (Professional) Australia Limited
for further information visit **www.thomsonreuters.com.au**
or send an email to **care.anz@tr.com**

Please note that this article is being provided for research purposes and is not to be reproduced in any way. If you refer to the article, please ensure you acknowledge both the publication and publisher appropriately. The citation for the journal is available in the footline of each page.

For information concerning permission to republish material from this journal, either in part or in its entirety, in any medium, please refer to **http://sites.thomsonreuters.com.au/journals/permissions.**
For general permission queries, contact **LTA.permissions@thomsonreuters.com**

Recognising the necessity for reform, the article proposes a series of recommendations aimed at enhancing the efficacy of the model litigant rules. These include strengthening enforcement mechanisms through clear penalties for non-compliance, providing unambiguous guidelines and definitions to reduce interpretative discrepancies, and implementing mandatory training programs for legal practitioners representing the Commonwealth.

Additionally, it advocates for regular monitoring and reporting mechanisms to increase transparency, an expanded emphasis on alternative dispute resolution (ADR) to promote efficient dispute settlement, the establishment of a formal complaint mechanism for aggrieved parties, and strategies to address power imbalances inherent in litigation involving the state.

By critically evaluating the existing regime and offering practical solutions, this article contributes to the ongoing discourse on how the Commonwealth can better fulfil its role as a model litigant. It underscores the importance of not only upholding legal obligations but also fostering public trust in the legal system through actions that embody the principles of justice, fairness, and integrity. The proposed reforms aim to align the Commonwealth's litigation practices with these principles, ensuring that its considerable power is exercised responsibly and ethically in the pursuit of justice.

The Legal Regime

The Commonwealth and its agencies are obligated to act as model litigants,[4] meaning they must conduct litigation with complete propriety, fairness, and in accordance with the highest professional standards.[5] This obligation requires them to handle claims promptly, avoid unnecessary delays, and make early assessments of their prospects of success and potential liabilities.[6]

They should pay legitimate claims without resorting to litigation, including making partial settlements or interim payments when liability is clear.[7] Consistency in handling claims is essential, and they must strive to avoid or limit the scope of legal proceedings by considering ADR methods before initiating litigation and participating in such processes when appropriate.[8]

When litigation is unavoidable, the Commonwealth and its agencies must keep costs to a minimum.[9] This includes not requiring the other party to prove facts they know to be true, not contesting liability when the dispute is about the amount of compensation, and actively seeking resolution through settlements or ADR.[10]

They should ensure representatives have the authority to settle claims during negotiations.[11] Importantly, they must not take advantage of claimants who lack the resources to litigate legitimate claims and should avoid relying on technical defences unless their interests would be prejudiced otherwise.[12]

Appeals should only be pursued if there are reasonable prospects of success or if it is justified in the public interest.[13] Additionally, they should apologise when aware of any wrongful or improper actions by themselves or their lawyers.[14]

[4] *Priest v New South Wales* [2007] NSWSC 41.

[5] *Legal Services Directions 2017* (Cth) App B, cl 1.

[6] *Legal Services Directions 2017* (Cth) App B, cl 2.

[7] *Legal Services Directions 2017* (Cth) App B, cl 2.

[8] *Legal Services Directions 2017* (Cth) App B, cl 2.

[9] *Legal Services Directions 2017* (Cth) App B, cl 2.

[10] *Legal Services Directions 2017* (Cth) App B, cl 2.

[11] *Legal Services Directions 2017* (Cth) App B, cl 2.

[12] *Legal Services Directions 2017* (Cth) App B, cl 2.

[13] Conrad Lohe, "The Model Litigant Principles" (Paper presented at the Legal Managers', Breakfast Briefing, Queensland, 28 June 2007).

[14] *Legal Services Directions 2017* (Cth) App B, cl 2.

This obligation applies to all forms of litigation, including proceedings before courts, tribunals, inquiries, and in arbitration or other ADR processes involving Commonwealth departments, agencies, ministers, and officers indemnified by the Commonwealth.[15] The courts have recognised this expectation for the Commonwealth to act as a model litigant, emphasising that it goes beyond merely following the law and ethical obligations – it demands the highest standards of conduct.[16] However, this does not prevent the Commonwealth from firmly protecting its interests, pursuing claims, defending against claims, or seeking to clarify significant legal points, even if the other party prefers to settle.[17] Enforcing cost orders and recovering costs are also permissible under this obligation.[18]

In merits review proceedings,[19] Commonwealth agencies must extend this obligation by using their best endeavours to assist tribunals in making decisions, paying close attention to relevant legislation and practice directions.[20]

Before commencing court proceedings, the Commonwealth and its agencies should consider ADR methods and, when participating in such processes, ensure their representatives are fully effective and have the authority to settle matters.[21] This approach facilitates appropriate and timely resolution of disputes, aligning with the overarching duty to act as a model litigant.[22]

In summary, the purpose of the model litigant rules is to ensure the Commonwealth and its agencies conduct litigation with the highest standards of integrity, fairness, and professionalism.[23] Essentially, the rules balance the Commonwealth's right to protect its interests with its duty to uphold justice and fairness in legal matters.[24]

Limitations of the Model Litigants

In this section, we will examine the limitations of the Commonwealth's model litigant rules.[25] Although these rules are ambitious, detailed, and comprehensive at first glance, significant constraints hinder their overall effectiveness.[26]

First, a fundamental limitation of the model litigant rules is their non-justiciable nature – they are not legally enforceable in courts.[27] These rules are part of the Legal Services Directions issued by the Attorney-General under the *Judiciary Act 1903* (Cth),[28] serving as guidelines rather than statutory obligations. Consequently, when the Commonwealth or its agencies breach these rules, the opposing party often lacks a direct legal remedy.[29]

---

[15] *Legal Services Directions 2017* (Cth) App B, cl 3.

[16] *Minister for Immigration, Citizenship and Multicultural Affairs v NDBR* [2024] FCAFC 114, [56].

[17] *Legal Services Directions 2017* (Cth) App B, cl 2.

[18] *Legal Services Directions 2017* (Cth) App B, cl 2.

[19] See Peter Billings, "Evaluating the Pedagogic Value of Mooting and 'Nooting' at the Administrative Appeals Tribunal (Cth)" (2017) 43(3) *Monash University Law Review* 687.

[20] *Legal Services Directions 2017* (Cth) App B, cl 4.

[21] *Legal Services Directions 2017* (Cth) App B, cl 5.

[22] *Legal Services Directions 2017* (Cth) App B, cl 2.

[23] Commonwealth to act as a model litigant predates the rules: *Yong v Minister for Immigration & Multicultural Affairs* (1997) 75 FCR 155, 166 (Beaumont, Burchett and Goldberg JJ).

[24] *Kenny v South Australia* (1987) 46 SASR 268, 273.

[25] See further Sebastian Howard Hartford Davis, "The Legal Personality of the Commonwealth of Australia" (2019) 47(1) *Federal Law Review* 3.

[26] See Matthew Groves, "Equality of Arms in Administrative Review" (2023) 46(3) *Melbourne University Law Review* 726.

[27] See *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333.

[28] See Matthew Groves, "The Changing Role of the Attorney-General" (2024) 52(2) *Federal Law Review* 131.

[29] Gabrielle Appleby, "The Government as Litigant" (2014) 37(1) *UNSW Law Journal* 94.

Courts have historically been reluctant to sanction the Commonwealth solely for breaches of the model litigant rules. For example, in *Scott v Handley*,[30] the Federal Court acknowledged that the Australian Government Solicitor had not acted in accordance with the model litigant obligation but declined to overturn the decision based on that breach alone. This reluctance stems from the judiciary's view that these obligations are administrative and ethical standards rather than enforceable legal duties.[31]

The absence of legal enforceability means that aggrieved parties cannot easily compel compliance or seek remedies for non-compliance through judicial means.[32] This limitation diminishes the practical effectiveness of the model litigant rules, as they rely heavily on voluntary adherence and internal enforcement within government agencies.

Second, the model litigant rules exhibit ambiguity and subjectivity in interpretation. The language used in the model litigant rules is often broad and open to interpretation, which can lead to ambiguity and subjective application. Terms like "act fairly,"[33] "avoid unnecessary delay," and "not relying on technical defences unless interests would be prejudiced" lack precise legal definitions, making consistent application challenging.

For instance, what constitutes "fair" conduct may vary between parties and contexts. An action perceived as fair by the Commonwealth might be viewed as unfair by the opposing party. Similarly, determining whether a delay is "unnecessary" can depend on numerous factors, such as case complexity, resource availability,[34] and procedural requirements.

This subjectivity can result in inconsistent behaviour across different cases and agencies. Without clear, objective criteria, individual lawyers and officials must exercise personal judgment, which may not always align with the intended standards of the model litigant rules.[35]

Third, there is a potential conflict with the duty to protect interests. The model litigant rules recognise that the Commonwealth has a legitimate interest in protecting its legal and financial interests. The accompanying notes explicitly state that the obligations do not prevent the Commonwealth from "acting firmly and properly to protect their interests".

This acknowledgment creates a potential conflict between the obligation to act as a model litigant and the duty to defend the Commonwealth's interests vigorously. In high-stakes litigation involving substantial public funds, sensitive policy issues, or significant legal principles, the imperative to protect these interests may override the aspirational standards of fairness and propriety.[36]

For example, the Commonwealth might choose to pursue an aggressive litigation strategy, employing all available legal tactics to secure a favourable outcome. While legally permissible, such an approach may conflict with the spirit of the model litigant obligations, which emphasise restraint and fairness.[37]

Fourth, there is the prospect of limited awareness and training. Effective compliance with the model litigant rules depends on the awareness and understanding of those responsible for conducting litigation on behalf of the Commonwealth. However, there is often a lack of consistent training and dissemination of information regarding these obligations.

---

[30] *Scott v Handley* (1999) 58 ALD 373; [1999] FCA 404.

[31] *Minister for Immigration, Citizenship and Multicultural Affairs v NDBR* [2024] FCAFC 114.

[32] RJ Desiatnik, "The Commonwealth 'Model Litigant Rules': Meaningful or Meaningless?" (2020) 48(2) *Australian Bar Review* 176.

[33] Abraham Klaasen, "The Duty of the State to Act Fairly in Litigation" (2017) 134(3) *South African Law Journal* 616.

[34] See *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 176 [42] (North, Logan and Robertson JJ); [2012] FCAFC 90.

[35] Bradley Selway, "The Duties of Lawyers Acting for Government" (1999) 10 PLR 114.

[36] John C Tait, "The Public Service Lawyer, Service to the Client and the Rule of Law" (1997) 23 *Commonwealth Law Bulletin* 542.

[37] Camille Cameron and Michelle Taylor-Sands, '"Corporate Governments" as Model Litigants' (2007) 10 *Legal Ethics* 154, who argue the model litigant obligation should extend to large corporations.

Government lawyers, both in-house and external counsel, may not receive adequate instruction on the nuances of the model litigant rules. This gap can lead to inadvertent non-compliance. For instance, a lawyer might aggressively pursue a technical defence without realising that the model litigant obligations discourage such tactics unless the Commonwealth's interests are genuinely prejudiced.

Moreover, high turnover rates within government legal teams and the use of external law firms unfamiliar with the specific expectations can exacerbate this issue. Without a concerted effort to educate all involved parties, adherence to the model litigant standards may be inconsistent.

Fifth, there are no direct consequences for breach.[38] The lack of direct penalties or sanctions for breaching the model litigant rules reduces the incentive for strict compliance. While internal disciplinary actions or reputational damage may occur, these consequences are often insufficient to deter non-compliant behaviour.

Unlike breaches of court orders or statutory obligations, which can result in legal penalties such as fines or adverse cost orders, violations of the model litigant rules typically do not attract such immediate repercussions. The opposing party cannot usually obtain compensation or other remedies solely based on a breach of these obligations.

This limitation means that the enforcement of the model litigant rules relies heavily on self-regulation and oversight within government agencies. Without external enforcement mechanisms, ensuring consistent compliance becomes more challenging.

Sixth, there are challenges in monitoring and compliance. Monitoring compliance with the model litigant rules is inherently difficult due to the decentralised nature of government litigation. Each Commonwealth agency is primarily responsible for ensuring adherence to these obligations in its litigation activities.[39]

This decentralised approach can lead to inconsistent enforcement and oversight. Some agencies may prioritise compliance and implement robust monitoring systems, while others may lack the resources or commitment to do so effectively. The Office of Legal Services Coordination within the Attorney-General's Department oversees compliance with the Legal Services Directions, including the model litigant rules, but its capacity to monitor all litigation conducted by the Commonwealth is limited.

Moreover, the sheer volume and diversity of cases involving the Commonwealth complicate monitoring efforts. Without comprehensive reporting and accountability mechanisms, instances of non-compliance may go unnoticed or unaddressed.

Seventh, there is the potential for increased costs and delays. Adhering to the model litigant obligations can sometimes lead to increased costs and delays in resolving disputes. The requirement to conduct early assessments of claims, avoid unnecessary litigation,[40] and consider ADR processes necessitates additional time and resources.

For example, thoroughly evaluating the Commonwealth's potential liability and prospects of success involves detailed legal analysis and consultation. Engaging in ADR processes, while beneficial for resolving disputes amicably, requires preparation and may extend the timeline before a final resolution is reached.

While these practices align with the principles of fairness and efficiency, they can paradoxically result in higher short-term costs and longer durations for individual cases. This outcome may be viewed unfavourably by agencies under pressure to minimise expenditure and resolve matters swiftly.

Eighth, one cannot forget the limitations in ADR processes. The model litigant rules encourage the use of ADR to resolve disputes without resorting to litigation. However, practical challenges can limit the effectiveness of ADR in achieving timely and appropriate resolutions.

---

[38] Jason Donnelly, "Abuse of Power and the Issue of Prerogative Commonwealth Model Litigant Policy" (2021) 18(2) *Canberra Law Review* 82.

[39] See further John Basten, "Disputes Involving the Commonwealth: Observations from the Outside" (1999) 92 *Canberra Bulletin of Judicial Administration* 38.

[40] Allan Fels et al, "The Management of Disputes Involving the Commonwealth: Is Litigation Always the Answer?" (1999) 92 *Canberra Bulletin of Public Administration* 21.

One significant limitation is the potential lack of authority among agency representatives participating in ADR processes. The rules stipulate that representatives should have the authority to settle matters during negotiations. In practice, bureaucratic hierarchies and approval processes may prevent representatives from making binding commitments without further consultation.

Resource constraints also pose challenges. Engaging in ADR requires time, expertise, and sometimes financial resources that agencies may be reluctant or unable to allocate. Additionally, strategic considerations, such as setting legal precedents or avoiding perceived weaknesses, may lead agencies to prefer litigation over ADR, even when ADR might be more appropriate.

Ninth, there is the real prospect of inconsistencies across agencies and cases. The application of the model litigant rules can vary widely across different agencies and types of cases. Factors such as agency culture, leadership priorities, and resource availability influence how diligently the obligations are observed.

For instance, agencies with a strong legal culture and dedicated legal departments may place greater emphasis on compliance with the model litigant rules. In contrast, smaller agencies or those without extensive litigation experience may lack the infrastructure or expertise to ensure consistent adherence.

Additionally, the nature of specific cases can affect compliance. High-profile or politically sensitive cases might prompt a more aggressive litigation approach, potentially at odds with the model litigant standards. Such inconsistencies can undermine the overall objective of the rules to promote fairness and integrity in government litigation.

Tenth, there is the limited scope and applicability. While the model litigant rules apply to litigation involving the Commonwealth and its agencies, their scope is confined to the conduct of litigation and related dispute resolution processes. They do not extend to other governmental activities, such as administrative decision-making, policy development, or legislative functions.

This limitation means that the principles of fairness and propriety embodied in the model litigant rules are not universally applied across all government interactions with the public.[41] For example, an agency might act with strict adherence to the model litigant obligations during litigation but engage in less fair practices during administrative processes leading up to the dispute.

Furthermore, the rules primarily focus on legal representatives and agency conduct during litigation, potentially overlooking systemic issues or behaviours that contribute to disputes. Without a broader application, the capacity of the model litigant rules to effect systemic improvements in government conduct is constrained.

Eleventh, there is the potential for strategic manipulation and necessity for balancing public interest considerations.[42] There is a risk that the model litigant rules could be strategically manipulated by opposing parties to gain an advantage in litigation. Knowing that the Commonwealth is bound by these obligations, litigants might adopt aggressive tactics, expecting the Commonwealth to respond with restraint.

For example, an opposing party might file frivolous motions or engage in dilatory tactics, anticipating that the Commonwealth will avoid responding in kind due to its model litigant obligations. This dynamic can place the Commonwealth at a strategic disadvantage, potentially leading to unfair outcomes.

The model litigant rules acknowledge that the Commonwealth may pursue litigation or appeals justified in the public interest, even if the other party wishes to settle. Determining what constitutes the public interest can be complex and subjective.

This balancing act can limit the effectiveness of the model litigant obligations. Agencies might justify aggressive litigation strategies or the pursuit of appeals on the grounds of public interest, even when

[41] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151, 196.

[42] See Matt Black, "The Model Litigant Obligation and Advancing Your Client's Position", (CPD Mandatory Core Areas for Government Lawyers, 19 March 2019) <https://mblack.com.au/papers/mattblack-modellitigant-2019.pdf>.

such actions might conflict with the principles of fairness and efficiency promoted by the model litigant rules.[43]

Finally, there is limited external oversight. External oversight mechanisms for enforcing compliance with the model litigant rules are limited. While bodies like the Commonwealth Ombudsman or parliamentary committees can scrutinise government conduct, their ability to address specific instances of non-compliance is constrained.

Without robust external accountability, the Commonwealth's adherence to the model litigant obligations depends largely on internal governance and the professionalism of individual lawyers and officials. This reliance on self-regulation can be insufficient to ensure consistent compliance across all agencies and cases.

Reform Needed

After examining the numerous limitations of the Commonwealth's model litigant rules in the previous section, we will now consider potential recommendations for improving the overarching regime related to these rules.[44]

Strengthening Enforcement Mechanisms. To ensure that the Commonwealth and its agencies adhere strictly to the Model Litigant Rules, it is imperative to introduce robust enforcement mechanisms. Currently, the rules outline the obligations but lack specific consequences for non-compliance, which can lead to inconsistent application and a lack of accountability.

The proposed reforms include:

- *Establishing Clear Penalties for Non-Compliance*. Introduce specific sanctions for breaches of the rules, such as financial penalties for agencies, disciplinary actions against responsible officials, or adverse cost orders in litigation.[45] This creates a tangible deterrent against misconduct.
- *Creating an Independent Oversight Body*. Set up an independent entity, such as a Model Litigant Compliance Commission, empowered to monitor compliance, investigate breaches, and enforce penalties. This body would operate transparently and report its findings to Parliament or a designated authority.
- *Implementing Judicial Oversight*. Empower courts and tribunals to take into account compliance with the Model Litigant Rules when making cost orders or other procedural decisions. Courts could be given explicit authority to penalise non-compliance, such as awarding indemnity costs against the Commonwealth.[46]
- *Mandatory Reporting of Breaches*. Require agencies to report any instances of non-compliance internally and to the oversight body. This promotes transparency and allows for systemic issues to be identified and addressed.
- *Training and Education as Part of Enforcement*. Incorporate corrective training for individuals or agencies found in breach, ensuring that mistakes are understood and not repeated.

By incorporating these enforcement mechanisms, the rules would have greater authority and effectiveness, ensuring that the Commonwealth upholds its obligation to act fairly and ethically in all litigation.

Providing Clearer Guidelines and Definitions

While the Model Litigant Rules list various obligations, some terms are ambiguous and open to interpretation, potentially leading to inconsistent practices. To address this issue, the rules should be revised to include precise definitions and detailed guidelines:

---

[43] Ron Jorgensen, "The Rule of Law and the Model Litigant Rules" (2011) 45(11) *Taxation in Australia* 678.

[44] Michelle Taylor-Sands and Camille Cameron, "Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Processes" (2010) 21 PLR 188.

[45] Christopher Peadon, "What Cost to the Crown a Failure to Act as a Model Litigant" (2010) 33 *Australian Bar Review* 239.

[46] Charles Gardner Geyh, "Informal Methods of Judicial Discipline" (1993) 142 *University of Pennsylvania Law Review* 243.

- *Defining Key Terms*. Clearly define terms such as "acting honestly and fairly," "unnecessary delay," "technical defences," "legitimate claims," and "reasonable prospects of success." For example, specify what constitutes an unnecessary delay and outline acceptable timeframes for different stages of litigation.
- *Developing Comprehensive Guidelines*. Create detailed procedural guidelines that illustrate how agencies should handle claims, assess liability, engage in ADR, and conduct themselves during litigation. These guidelines should include step-by-step processes and best practice examples.
- *Including Illustrative Examples*. Provide case studies and hypothetical scenarios that demonstrate proper and improper application of the rules. This aids in practical understanding and helps prevent misinterpretation.
- *Regular Updates to Reflect Legal Developments*. Establish a process for periodically reviewing and updating the guidelines to reflect changes in law, technology, and societal expectations, ensuring that the rules remain current and relevant.
- *Dissemination and Accessibility*. Ensure that the guidelines are easily accessible to all relevant parties, including agency staff, legal practitioners, and the public. This could involve publishing them on official websites and incorporating them into training programs.

By providing clearer guidelines and definitions, agencies and legal practitioners can better understand their obligations, leading to more consistent and fair application of the Model Litigant Rules.

Implementing Mandatory Training for Legal Practitioners

The effectiveness of the Model Litigant Rules largely depends on the awareness and understanding of those who represent the Commonwealth in legal matters. To enhance compliance, it is recommended to introduce mandatory training programs:

- *Comprehensive Training Programs*. Develop mandatory training courses for all legal practitioners engaged by the Commonwealth, including in-house counsel and external lawyers. The curriculum should cover the principles of the Model Litigant Rules, ethical obligations, practical application, and consequences of non-compliance.
- *Certification Requirements*. Require legal practitioners to complete this training and obtain certification before representing the Commonwealth. This ensures that all representatives are adequately prepared to uphold the highest standards.
- *Regular Refresher Courses*. Implement ongoing education through periodic refresher courses to keep practitioners updated on any changes to the rules, guidelines, or relevant case law.
- *Specialised Training for High-Risk Areas*. Provide additional training for practitioners involved in areas with a higher risk of non-compliance, such as complex litigation, appeals, or matters involving vulnerable parties.
- *Monitoring and Evaluation*. Establish mechanisms to assess the effectiveness of the training programs, including feedback from participants, evaluation of learning outcomes, and monitoring of compliance rates post-training.

By investing in education and training, the Commonwealth ensures that its legal representatives are fully equipped to act in accordance with the Model Litigant Rules, promoting ethical conduct and reducing the likelihood of breaches.

Establishing Regular Monitoring and Reporting Mechanisms

To promote transparency and accountability, a system of regular monitoring and reporting on compliance with the Model Litigant Rules should be instituted:[47]

---

[47] See also Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 528, which notes that most of the equivalent rules of the states and territories do not contain (or require) such a statement because they are administrative policies rather than legislative documents and by their character are not directly enforceable against the government they were issued by.

- *Annual Compliance Reports*. Require agencies to prepare and submit annual reports detailing their adherence to the Model Litigant Rules. These reports should include data on the number of claims handled, instances of ADR usage, settlements made, litigation outcomes, and any breaches of the rules.
- *Key Performance Indicators (KPIs)*. Develop specific KPIs related to model litigant behaviour, such as the percentage of cases settled without litigation, average time taken to resolve claims, and rates of successful ADR processes. Agencies would report on these metrics annually.
- *Independent Audits*. Mandate periodic independent audits of agencies' litigation practices to verify the accuracy of self-reported data and assess overall compliance. Auditors could examine case files, interview staff, and evaluate processes.
- *Public Disclosure*. Publish the compliance reports and audit findings to enhance transparency and allow for public scrutiny. This can build public trust and encourage agencies to maintain high standards.
- *Feedback Loops*. Create mechanisms for agencies to receive and act upon feedback from the oversight body, courts, and the public regarding their litigation conduct. This could involve implementing recommended improvements and reporting on progress.

By establishing regular monitoring and reporting, the Commonwealth can systematically track compliance, identify trends, and address issues proactively, ensuring ongoing adherence to the Model Litigant Rules.

Expanding Emphasis on Alternative Dispute Resolution

ADR offers a means to resolve disputes efficiently and amicably, reducing the burden on courts and saving resources. To strengthen the commitment to ADR:[48]

- *Mandatory Consideration and Documentation of ADR*. Require agencies to actively consider ADR in all cases and document their assessment. If ADR is not pursued, agencies must provide written justification explaining why it was deemed inappropriate.
- *Early Engagement in ADR*. Encourage agencies to initiate ADR processes at the earliest feasible stage, ideally before formal litigation commences. Early engagement can prevent the escalation of disputes and foster collaborative solutions.
- *Training in ADR Techniques*. Provide specialised training for agency staff and legal practitioners in negotiation, mediation, and other ADR methods. This equips them with the skills necessary to effectively participate in and facilitate ADR processes.
- *Allocation of Resources*. Allocate sufficient resources and support for ADR initiatives, including appointing dedicated ADR coordinators within agencies and ensuring access to qualified mediators.
- *Incentivising ADR Outcomes*. Implement policies that recognise and reward successful ADR outcomes within agencies, such as performance metrics linked to the resolution of disputes without litigation.

By expanding the emphasis on ADR, the Commonwealth can fulfil its obligation to avoid unnecessary litigation, reduce costs, and promote positive relationships with other parties.

Establishing a Formal Complaint Mechanism

Introducing a formal mechanism for individuals and parties to lodge complaints about breaches of the Model Litigant Rules would enhance accountability and provide recourse for those affected:[49]

- *Accessible Complaint Process*. Develop a straightforward and accessible process for submitting complaints, including online submission options and clear guidance on the information required.

[48] See Justice GT Pagone, "The Model Litigant and Law Clarification" (Speech delivered at the ATP Leadership Workshop, 17 September 2008).

[49] Alina A El-Jawhari, "The Regulation of Government Litigants and Their Lawyers: The Regulatory Force of Victoria's Model Litigant Guidelines" (2016) 19(2) *Legal Ethics* 234.

- *Independent Complaint Handling Body*. Establish or designate an independent body responsible for receiving, investigating, and resolving complaints. This body should operate transparently and be empowered to enforce remedies or recommend disciplinary actions.
- *Timely Investigation and Resolution*. Set clear timelines for acknowledging complaints, conducting investigations, and providing outcomes. Prompt handling of complaints ensures that issues are addressed effectively.
- *Confidentiality and Protection*. Ensure that the complaint process protects the confidentiality of complainants and safeguards them from any form of retaliation or adverse consequences.
- *Publication of Complaint Outcomes*. Regularly publish anonymised summaries of complaints and their resolutions, contributing to transparency and allowing agencies to learn from identified issues.
- *Integration with Monitoring Systems*. Link the complaint mechanism with the broader monitoring and reporting framework to identify systemic problems and inform policy or procedural changes.

Establishing a formal complaint mechanism empowers parties to seek redress and reinforces the Commonwealth's commitment to acting as a model litigant.'

Addressing Power Imbalances

The Commonwealth, by virtue of its resources and authority, holds a significant advantage over most litigants.[50] To prevent the misuse of this power:

- *Guidelines on Fair Conduct*. Develop specific guidelines that prohibit the use of litigation strategies aimed at overwhelming or intimidating less-resourced parties. This includes avoiding unnecessary procedural hurdles, excessive legal demands, or aggressive tactics.
- *Support for Self-Represented Litigants*. Implement policies that require agencies to assist self-represented litigants in understanding procedures and processes, without compromising the agency's legal position. This could involve providing plain-language explanations and avoiding legal jargon.
- *Proportionality in Resource Allocation*. Ensure that the level of resources dedicated to a case is proportionate[51] to its complexity and significance. Over-resourcing minor cases can be a form of intimidation and is contrary to acting fairly.
- *Transparency and Communication*. Maintain open lines of communication with opposing parties, clearly articulating the Commonwealth's position and considering reasonable offers or counterproposals.
- *Monitoring and Addressing Unfair Practices*. Include considerations of power imbalances in the monitoring and reporting mechanisms. Agencies should report on measures taken to prevent exploitation of their position and address any identified issues.[52]

By actively addressing power imbalances, the Commonwealth upholds the principles of fairness and justice, ensuring that all parties have a fair opportunity to resolve disputes.[53]

Implementing these top seven recommendations would significantly enhance the Commonwealth's adherence to the Model Litigant Rules. By strengthening enforcement mechanisms,[54] providing clearer guidelines, mandating training, establishing monitoring systems, emphasising ADR, creating a formal complaint process, and addressing power imbalances, the Commonwealth can ensure it acts with the highest standards of propriety and fairness in litigation.

These reforms not only uphold ethical obligations but also promote public confidence in the legal system and contribute to more efficient and equitable dispute resolution.

---

[50] Niamh Kinchin, "Mediation and Administrative Merits Review: An Impossible Goal?" (2007) 18(4) ADRJ 227.

[51] Judith Bessant, "Procedural Justice, Conflict of Interest and the Stolen Generations' Case" (2004) 63(1) *Australian Journal of Public Administration* 74.

[52] See further Australian Government Productivity Commission, *Access to Justice Arrangements* (Issues Paper, September 2013) iii–v.

[53] Katherine Hooper, "Model Litigants, Migration, Merits Review and … Mediation?" (2013) 32(1) *University of Queensland Law Journal* 157.

[54] Taylor-Sands and Cameron, n 44.

CONCLUSION

The model litigant rules are foundational to ensuring that the Commonwealth and its agencies conduct litigation with the highest standards of integrity, fairness, and professionalism. They serve not only as guidelines for ethical legal conduct but also as a mechanism to balance the considerable power of the state against individual litigants, thereby upholding justice and public confidence in the legal system. However, the effectiveness of these rules is significantly hindered by a range of limitations that undermine their intended purpose.

The non-justiciable nature of the model litigant rules means they lack legal enforceability, leaving aggrieved parties without direct remedies when breaches occur. Ambiguities in the language of the rules lead to subjective interpretations and inconsistent application across different cases and agencies. The inherent conflict between the obligation to act fairly and the duty to vigorously protect the Commonwealth's interests often results in aggressive litigation strategies that contravene the spirit of the model litigant obligations.

Moreover, inadequate awareness and training among government lawyers contribute to inadvertent non-compliance, while the absence of direct consequences for breaches diminishes the incentive for strict adherence. Challenges in monitoring compliance, limited external oversight, and the decentralised nature of government litigation further exacerbate these issues. The potential for increased costs and delays, limitations in ADR processes, and inconsistencies across agencies highlight systemic flaws that require urgent attention.

Recognising these shortcomings, it is evident that substantive reforms are necessary to enhance the effectiveness of the model litigant rules. Strengthening enforcement mechanisms by introducing clear penalties for non-compliance and establishing independent oversight bodies would create tangible deterrents against misconduct. Providing clearer guidelines and definitions would reduce ambiguities and promote consistent application of the rules. Mandatory training for legal practitioners is essential to ensure that those representing the Commonwealth are fully equipped to uphold these obligations.

Implementing regular monitoring and reporting mechanisms would improve transparency and accountability, while expanding the emphasis on ADR could lead to more efficient and amicable resolutions of disputes. Establishing a formal complaint mechanism empowers affected parties to seek redress and reinforces the Commonwealth's commitment to ethical conduct. Addressing power imbalances ensures that the significant resources and authority of the Commonwealth are not used to the detriment of less-resourced litigants, upholding the principles of fairness and justice.

By adopting these recommendations, the Commonwealth can significantly enhance its adherence to the model litigant rules, ensuring that it acts with the highest standards of propriety and fairness in litigation. These reforms not only fulfil ethical obligations but also promote public confidence in the legal system and contribute to more efficient and equitable dispute resolution. Ultimately, strengthening the model litigant regime aligns with the fundamental principles of justice and the rule of law, reinforcing the Commonwealth's role as a model litigant and guardian of the public interest.