

THE ROLE AND RESPONSIBILITY OF THE STATE IN LITIGATION

Abstract: This article considers the role of the State as a litigant before the Courts. The Australian model litigant obligation is examined and in line with this, some policy changes are suggested.

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Introduction

The High Court and the Court of Appeal are inundated by the volume of litigation pending before those courts. Figures from the Central Office of the High Court indicate that in 2016 43,132 new civil issues were lodged in the High Court. The figure for 2017 is 39,659, these figures include new applications in existing proceedings.¹ It appears that approximately 20,000 new proceedings were issued in 2018.² This means over 100,000 applications were added to the existing caseload within a period of three years. These applications fall to be determined in the first instance, by 40 High Court judges and thereafter on appeal by 10 Court of Appeal judges, soon to be 16. Even assuming a huge attrition rate by reason of settlements or discontinuance, this represents an enormous workload for 40 High Court judges to hear and determine.

Added to the volume of cases coming before the Courts is the fact of the increasing complexity of those cases. Every new piece of legislation, be it primary legislation or statutory instrument, is a potential occasion of litigation. Just as there is a huge volume of applications being lodged in our courts, there is also an ever-increasing volume of legislation being enacted. Using the same three years, 2018, 2017, and 2016 as an example of the volume of legislation that has been enacted; 42 statutes and 665 Statutory Instruments in 2018; 41 statutes and 646 Statutory Instruments in 2017; and 22 statutes and 685 statutory instruments in 2016. In 2019, 53 statutes and 700 Statutory instruments have been enacted. Each piece of legislation changes our law. These are not, in the main, straightforward or simple changes. Many of the statutory instruments are transposing European law into the national legislative framework. This is achieved by amending existing national legislation. Where statutory instruments are used to transpose European law, very fine and very detailed legal argument can ensue as to the effect of an amendment and whether that amendment has properly transposed European law. Were it not for the extremely valuable work of the Law Reform Commission in updating and consolidating legislation and showing the derivation of amendments made by statutory instrument, it would be virtually impossible to know the state of Irish law at any given time.

The upshot of the ever-increasing volume of litigation and complex legislation is that the High Court and the Court of Appeal are swamped. The Supreme Court has been, as it were, evacuated

¹ Courts Service, 'Annual Report 2017' (Courts Service 2018) 46.

² Email from Alice A White, Central Office of the High Court, to Author (04 July 2019).

to higher ground by the creation of the Court of Appeal. It has regained control of its list and is in a position to determine which cases require to be determined in the interests of justice and in the public interest. Meanwhile, the High Court and the Court of Appeal by contrast are under constant and unrelenting pressure to hear cases and deliver judgements. This constant pressure has potential ramifications for the rule of law and the independence of the judiciary. There should be concern that the quality of determinations may suffer because of constant pressure to deliver a decision. Might a High Court judge under pressure opt to give a less considered decision in the hope that the case might be teased out more fully in the Court of Appeal? If a decision in favour of one party in a case would result in a multiplicity of new applications to the High Court, could there be pressure, even subliminally, to give a decision that would not have that effect?

The essential prerequisites for a system that espouses the ‘rule of law’ is that every litigant receives due process from an independent judge. Ireland has always ranked highly in evaluations of judicial independence. In a 2018 EU survey, Ireland was ranked third in the EU in terms of judges’ perceptions of judicial independence.³ Similarly, in a 2017 EU study, Ireland was one of six countries to rate the independence of the judiciary between a 9 and a 10 out of 10.⁴ However, despite this laudable record, the independence of the Irish judiciary, and indeed, the rule of law could potentially be under threat because of the volume and complexity of the caseload facing the courts.

The need for additional judicial supports was highlighted in a 2017 EU survey, where in response to the question: ‘what would most contribute to the independence of the judiciary?’ the most common answer given in Ireland was ‘better working conditions regarding court resources.’⁵ Compounding this lack of resources is the fact that Ireland has consistently ranked poorly regarding the number of judges per inhabitants. In 2010, the Association of Judges of Ireland reported that Ireland had the lowest number of judges per one hundred thousand inhabitants, of 47 countries examined by the European Commission, with 3.2 judges per one hundred thousand inhabitants.⁶

Similarly, the 2018 European Judicial Systems Efficiency and Quality of Justice study recorded that in 2016 Ireland had three judges per 100,000 inhabitants, making it the joint lowest ranking, alongside England and Wales.⁷ The extent of the pressure on the courts can be seen by examining the waiting periods for cases to be heard, with an Irish Times Report in March 2019 noting that on average, there is a six month waiting time for criminal cases to be heard and a two year waiting period for civil cases.⁸ Thus, while remaining insulated from political

³ European Commission, *The 2018 EU Justice Scoreboard* (European Commission 2019) 44

<https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf> accessed 21 June 2019.

⁴ European Network of Councils For The Judiciary, *ENCJ Report 2016* (2017)

<https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adopted_ga_13_6.pdf> accessed 21 June 2019.

⁵ *ibid* 62.

⁶ Association of Judges Ireland, *Who are the Judiciary?* (AJII 2019) <<https://aji.ie/the-judiciary/who-are-the-judiciary/>> accessed 21 June 2019.

⁷ Council of Europe, *European Judicial Systems Efficiency and Quality of Justice* (CEPEJ Studies Number 26, Council of Europe 2018) <<https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>> accessed 21 June 2019.

⁸ Carl O’Brien, ‘Six New Judges For Court Of Appeal To Help Cut Waiting Times For Cases,’ *The Irish Times* (Dublin, 22 March 2019) <<https://www.irishtimes.com/news/crime-and-law/courts/six-new-judges-for-court-of-appeal-to-help-cut-waiting-times-for-cases-1.3834458>> accessed 24 June 2019.

interference, the independence of the judiciary is rendered vulnerable by an untenable caseload, and a dearth of adequate support services.

The Role of The State

The state is the most frequent litigant appearing before our courts. It is difficult to get accurate statistics as to the precise number of cases in which the state is involved. However, a scan of the list of delivered judgements on the court's website indicates the high level of state participation in litigation with the state appearing on one or other side of a majority of cases and sometimes on both sides of a case. The focus of this paper is to suggest policy changes which could significantly alleviate the burden on the courts.

Two policy changes by the state could significantly reduce the volume of litigation in our courts. The first suggested change is that the State should stop suing itself in our courts. The second is that the State should consider adopting the Australian policy of the 'State as Model Litigant'.

State Suing Itself

The phenomenon of State agencies suing other State agencies or state departments is growing. This phenomenon appears to have arisen from the state's policy of devolving functions previously carried out by departments of state to independent statutory agencies. At last count, there are 198 independent State agencies and 31 local authorities. Each of these bodies has the legal capacity to sue each other and the state itself. These State agencies are funded from the public purse. When they make forays into our courts it is the public which pays.

This is an issue already raised in a judgement I delivered in the case of *National Museum of Ireland v Minister for Social Protection*⁹:

Both the applicant and the respondent are emanations of the State and the Court requested the parties to address it on the relevance of that fact for the Court's decision on costs. In recent decades, the State has devolved functions previously administered directly by the State to a multiplicity of statutory agencies. A perhaps unintended, by-product of this policy is the phenomenon of statutory agencies suing the State or each other in expensive litigation before our courts. In such cases the costs of both state parties are ultimately paid from the public purse regardless of the outcome of the litigation. Unlike private litigants, these state parties do not have the concern that if unsuccessful in litigation, they will be saddled with costs which will have to be met from their own resources. In private litigation, the prospect of a hefty costs order is a potent incentive to reasonableness, both in the conduct of litigation and in the settlement of actions. Such incentive is entirely absent where the competing parties know that whatever the outcome of the action their costs will be met from the public purse. This strikes the Court as being an undesirable state of affairs both because of the burden placed on the public purse and the burden placed on the resources of the

⁹ [2017] IEHC 198.

courts. Intra-state disputes should be resolved by the State and one arm of the State should not be suing another arm of the State in our courts. The fact that this occurs demonstrates, in the Court's view, a lack of proper governance.¹⁰

Having considered the applicable law on costs the court in that case was forced to the conclusion that as a matter of law it had no discretion to refuse costs. It concluded:

While the Court remains of the view that it is undesirable that public funds and public resources be expended on the resolution of disputes between state bodies/agencies, the Court is compelled on the authorities to hold that the resolution of the issue is a matter for the executive and the legislature. Until such time as the executive and legislature see fit to enact an alternative method of dispute resolution among state agencies or to debar state agencies from suing each other within our courts, independent statutory bodies will continue to have an entitlement to sue each other in our courts with the entire cost being met from the public purse. As matters stand, the status of the parties to the litigation does not amount to a special circumstance such as would allow the Court to depart from the general rule [on costs].¹¹

This incidence of the State suing itself, if unchecked, is likely to continue and increase. The likely tsunami of applications in relation to GDPR from both state and private litigants will further increase the burden on scarce court resources.

The cost of the State agencies conducting their disputes before our courts was starkly illustrated in the case of *Lett & Company Ltd v Wexford Borough Council & The Minister for Communications, Marine and Natural Resources, Ireland and the Attorney General*.¹² In that case Wexford Borough Council wanted to provide a new water treatment plant for Wexford town. This required the construction of an outflow pipe into Wexford Harbour. In order to construct the pipe, they had to get a foreshore license from the second named defendant. The plaintiff, Lett & Co, had licenced mussel beds in the area and an issue of compensation for disturbance of those beds arose.

Rather than take the sensible approach of having the Borough Council and the State department come together to resolve the issues that arose, each of them retained separate legal representation and fought the plaintiff and each other for 29 days in the High Court. Some further days were spent on appeal to the Supreme Court. The cost to the public purse of this case is not known. At page 250, para 16 of his judgement O'Donnell J stated:

It is, I hope, not merely hindsight to suggest that what ought to have been done was obvious. A simple compensation scheme should have been devised and approved by the Minister. The Council should have included that in the cost of the development, just as the cost of the acquisition of land for the treatment plant was itself a necessary cost. The party with a liability to pay that

¹⁰ *ibid*, [4].

¹¹ [2017] IEHC 198, [10].

¹² [2012] IESC 14, [2012] 2 ILRM 283.

compensation had an obvious incentive to ensure that the initial exclusion zone was revised as soon as possible to limit both the area for which compensation was payable, and the time over which that compensation should be assessed. When it became clear that both the Department and the Council were becoming embroiled in expensive litigation, it ought to have been possible to have the differences between them resolved by an effective process of internal mediation or adjudication which, if it did not resolve the dispute, might at worst have allowed the litigation to be dealt with more efficiently. In the event the mechanism of a High Court action was the only route left open to the plaintiff to force the defendants to address their responsibilities. Litigation will produce a final result but at a considerable cost in terms of time, resources and finance. It was perhaps the most protracted and expensive way imaginable of resolving these issues.¹³

This practice could be ended by legislative provisions requiring state agencies who are in dispute with each other or the state to engage in alternative dispute resolutions. Perhaps such legislation could also contain provisions that in the event that state agencies sue each other or the state in court there be no order made as to costs.

At the beginning of the century there was a short-lived occurrence of the Gaelic Athletic Association suing itself in our courts. A player who had been sent off in the county semi-final and who for that reason was precluded from playing in the final might come before the Circuit Court or the High Court seeking an injunction on the grounds that there was a want of fair procedures in the imposition of the ban.¹⁴ In another scenario, a club might seek to injunct another club from playing in a semi-final because that club had fielded an ineligible player in the quarter-final.¹⁵ The phenomenon was short-lived because the GAA with commendable alacrity developed a comprehensive disciplinary procedure replete with protections for fair procedures and a disciplinary process for the resolution of disputes. All GAA members were bound by the new procedures and thus ended the practice of the GAA suing itself in our courts.

While issues arising between emanations of the state may be more complex, the principle remains the same and it is within the power of the state to require that all such agencies avail of particular dispute resolution mechanisms.

State as a model litigant

Significant saving of court time and taxpayer's funds, as well as a reduction in the volume of litigation might also be achieved were the state to adopt the Australian policy of the 'State as Model Litigant'.

¹³ *ibid*, [16].

¹⁴ 'All-Ireland minor final ban on hurler lifted' *The Irish Times* (Dublin, 7th September 2002) <<https://www.irishtimes.com/news/all-ireland-minor-final-ban-on-hurler-lifted-1.1094571>> accessed 5th February 2020.

¹⁵ Martin Breheny & Ciaran Lennon, 'High Court ruling halts club match' *The Irish Independent* (Dublin, 13th September 2002) <<https://www.independent.ie/sport/gaelic-football/high-court-ruling-halts-club-match-26034540.html>> accessed 5th February 2020.

At common law, the concept of the State acting as a model litigant stems back to the case of *Melbourne Steamship Co Ltd v Moorehead*,¹⁶ where Griffith CJ discussed ‘the old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects’.¹⁷ This pronouncement echoed earlier statements on the role of the State in litigation. For example, in the early case of *Deare v Attorney General*,¹⁸ Lord Steare noted that:

it has been the practice which I hope will never be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred.¹⁹

The philosophy underpinning the model litigant obligation is that the state ought to act as a ‘moral exemplar’.²⁰ The State is not an ordinary party involved in adversarial proceedings; rather the State is the ultimate guarantor of the rights of its citizens, and therefore, its role in litigation ought to be viewed through that prism.²¹ The concept was discussed by Finn J in *Hughes Aircraft Systems International v Air Services Australia*, where he stated that a public body ‘has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve’.²² More recently, this concept was reaffirmed in *Australian Securities and Investments Commission v Hellicar*, where Heydon J noted that the State ‘has no legitimate private interest in the performance of its functions’.²³

The model litigant obligation has also been justified on the basis that the executive owes an obligation to justice, as discussed in *P & C Cantarella v Egg Marketing Board*, where Mahoney J noted ‘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’.²⁴ On a more practical level, the model litigant obligation recognizes the fact that the government has a larger wealth of resources at its disposal than an ordinary litigant.²⁵

Legal Services Directions

In Australia, the model litigant obligation was first reduced to writing in the Legal Services Direction in 1999. The code was overseen by the Attorney General’s office. The policy is now set out in Appendix B of the Commonwealth Legal Services Directions 2017.²⁶ The model litigant obligation is a matter of policy, which is not justiciable on the part of private litigants. Recently, the Judiciary Amendment (Commonwealth Model Litigant) Bill 2017 was introduced. This aims to galvanize the model litigant obligation. The Bill, which is currently before the Senate, was introduced in response to concerns regarding the enforcement of the model litigant

¹⁶ (1912) 15 CLR 333.

¹⁷ *ibid*, 342.

¹⁸ (1835) 1 Y&CEC 197.

¹⁹ *ibid*, 208.

²⁰ *Kenny v South Australia* (1987) 46 SASR 268.

²¹ See further for discussion Gabrielle Appleby, ‘The Government as a Litigant’ (2014) 37(1) UNSW Law Journal 97.

²² (1997) 76 FCR 151, 196.

²³ [2012] HCA 17, [239].

²⁴ [1973] 2 NSWLR 366, 383.

²⁵ See for discussion; Gabrielle Appleby, ‘The Government as a Litigant’ (2014) 37(1) UNSW Law Journal 94, 98.

²⁶ Geroge Brandis, ‘Legal Services Directions 2017’ (Federal Register of Legislation 2017) <<https://www.legislation.gov.au/Details/F2017L00369>> accessed 21 June 2019.

obligation. The 2017 Bill will potentially strengthen the model litigant obligation by obliging the Attorney General to require Commonwealth litigants to act as model litigants and by creating a process, which will allow the Commonwealth Ombudsman to investigate complaints of infringement of these obligations. If a Court finds that there has been such an infringement, the Bill will empower it to make such orders as it sees fit.²⁷

Legal Services Direction 2017 (Commonwealth)

As mentioned above, the Legal Services Direction 2017 contains the model litigant obligation at Commonwealth level. Similar policies are in place at local level in New South Wales, Victoria, the Australian Capital Territory, the Northern Territory and Queensland. South Australia, Tasmania and Western Australia do not have individual codes, but abide by the common law rules in relation to model litigant obligations.²⁸

The model litigant obligation is set out in Appendix B of the Legal Services Direction 2017. Section 1 of Appendix B, entitled ‘The obligation’ states: ‘[c]onsistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and Commonwealth agencies are to behave as model litigants in the conduct of litigation’.²⁹

Nature of the Obligation

The obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency by:

- (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
 - (aa) making an early assessment of:
 - (i) the Commonwealth’s prospects of success in legal proceedings that may be brought against the Commonwealth; and
 - (ii) the Commonwealth’s potential liability in claims against the Commonwealth

²⁷ Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/s1101_ems_c94bb0bb-2c33-4dd7-9dcc-e15a9773623d%22> accessed 2 August 2019.

²⁸ New South Wales, Model Litigant Policy: <<https://www.justice.nsw.gov.au/legal-services-coordination/Documents/Model%20Litigant%20Policy%20for%20Civil%20Litigation.pdf>> accessed 24 June 2019; Victoria, Model Litigant Guidelines <<https://www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-model-litigant-guidelines>> accessed 24 June 2019; Queensland, Model Litigant Principles <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>> accessed 24 June 2019; Australian Capital Territory, Model Litigant Guidelines: <<https://www.legislation.act.gov.au/ni/2010-88/>> accessed 24 June 2019; & Northern Territory, Model Litigant Policy <https://justice.nt.gov.au/__data/assets/pdf_file/0004/259294/model-litigant-policy.pdf> accessed 24 June 2019. See for discussion Philip Salem, ‘The Government’s Model Litigant Policy – Ethical Issues’ (2015) <<https://www.sparke.com.au/custom/files/docs/model-litigant-policy.pdf>> accessed 24 June 2019.

²⁹ Legal Services Directions (n 26), Appendix B (1)

- (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, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution processes where appropriate
- (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 Commonwealth or the agency knows to be true
 - (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
 - (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
 - (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or a Commonwealth agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
- (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and 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, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongly or improperly.

Breadth and Enforcement of the Obligation

‘Ensuring compliance with the obligation is primarily the responsibility of the Commonwealth agency which has responsibility for the litigation’.³⁰ The code also provides that the obligation to act as a model litigant applies to arbitration and other alternative dispute resolution processes, as well as to litigation.³¹ ‘In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards’.³² The code notes that ‘the obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules’.³³ It goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

³⁰ Legal Services Directions (n 24), Appendix B, Section 2, Note 1.

³¹ *ibid.*

³² Legal Services Directions (n 24), Appendix B, Section 2 Note 2.

³³ Legal Services Directions (n 24), Appendix B, Section 2 Note 3.

The adoption of the Model Litigant policy does not preclude the state from vigorous defence of claims where such is required. This is specifically provided for in Appendix B which states that:

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 commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or a Commonwealth 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. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest).

³⁴

Note 5 of Section 2 Appendix B confirms that the obligation does not prevent the Commonwealth seeking orders for costs.

The model litigant code specifically provides that the obligation applies to state agencies not just the state itself. The obligation extends to Commonwealth agencies involved in merits review proceedings.³⁵ ‘The Commonwealth or a Commonwealth agency is only to start court proceedings if it has considered other methods of dispute resolution (e.g. alternative dispute resolution or settlement negotiations)’.³⁶ It further states that:

when participating in alternative dispute resolution, the Commonwealth and Commonwealth agencies are to ensure that their representatives: (a) participate fully and effectively, and (b) subject to paragraph 2 (e) (iv), have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.³⁷

The adoption of the model litigant obligation by our state would dramatically affect the conduct of litigation. The state would be required to make an early assessment of every claim made against it. Following that early assessment, the state would be obliged to pay legitimate claims without recourse to litigation. In those claims which cannot be resolved, the state would first have to consider alternative dispute resolution before resorting to litigation. Where litigation is necessary then the state would have a duty to ensure that it is conducted effectively and expeditiously. As King CJ noted in *Kenny v South Australia*, the Attorney General and the Court have ‘joint responsibility for fostering the expeditious conduct of and disposal of litigation’.³⁸

³⁴ Legal Services Directions (n 24), Appendix B, Section 2 Note 4.

³⁵ Legal Services Directions (n 24), Appendix B, Section 3.

³⁶ Legal Services Directions (n 24), Appendix B, Section 5.1.

³⁷ Legal Services Directions (n 24), Appendix B, Section 5.2.

³⁸ (1987) 46 SASR 268, 273.

The effect on litigation in Australia of the Model Litigant Policy

The policy imposes a higher ethical duty on lawyers acting for the state than the general ethical duty imposed on legal professionals. On this aspect of the policy one academic commentator has said that:

[G]overnment 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.³⁹

Academic Zac Chami discusses this idea of the public interest being served by the possible adoption of the State as a Model Litigant in her seminal article,⁴⁰ where she states: 'in order to do justice, the imbalance in power and resources between government and private litigants requires that government litigants act in a manner which is more restrained than that expected of their opponents'.⁴¹

The importance of the State setting an example of 'conscientious compliance with the procedures designed to minimise cost and delay' was also noted by the Chief Justice King in *Kenny v South Australia*.⁴² Reflecting this judicial analysis, a revised version of the State as a Model Litigant guidelines was approved in 2011, placing renewed emphasis on cost minimisation and the increased use of Alternative Dispute Resolution. Stephen Lee, an Australian Solicitor, has observed of the Australian experience of the State as a Model Litigant that: 'Although the model litigant principles can be easily stated, their application often requires matters of fine judgment and degree. It is possible for reasonable lawyers to disagree on the precise application of the model litigant principles in particular circumstances'. However, he does note that the duty to 'Act fairly' means a: 'pervasive obligation applies at all stages of the litigation process. Furthermore, the State must not act arbitrarily, capriciously or in a high-handed fashion'.⁴³

Dealing with cases as quickly as possible, or using alternatives to litigation, such as mediation, ensures that there are less delays and that scarce court time and resources are saved. The Model Litigant policy provides a structured framework for Courts to hold parties accountable for their conduct in litigation.

³⁹ Gino Dal Pont, *Lawyer's Professional Responsibility in Australia* (1st edn, Thomson Reuters 2006) 296-297; Insistence upon the Model Litigant standard is a recurrent theme in judicial decisions in relation to the conduct of litigation by the various emanations of the government, see further *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166; 144 ALR 695; *Hughes Aircraft Systems International v Air services Australia* [1997] FCA 558; (1997) 76 FCR 151, 196-197; [1997] FCA 558; 146 ALR 1; *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346, 368; 139 ALR 595; *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263 AT 267; *Kenny v South Australia* (1987) 46 SASR 268, 273; *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 558-589; *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366, 383-384.

⁴⁰ Zac Chami, 'The Obligation to Act as a Model Litigant' (2010) 64 AIAL Forum 47.

⁴¹ *ibid*, 49

⁴² (1987) 46 SASR 268.

⁴³ Stephen Lee, 'The State as a Model Litigant' (Lunchtime Seminar Series, Victoria Government Solicitor's Office, September 2006) <<https://www.vgso.vic.gov.au/sites/default/files/publications/The%20State%20as%20Model%20Litigant.pdf>> accessed 5th February 2020.

The Obligation in Practice

The foundations of the model litigant obligation in Australia are well established. It is worth considering how the Australian courts have grappled with the application of this obligation in practice. The approach of the Australian judiciary offers an example of how the model litigant obligation might work in Ireland. In navigating this area, the Australian Courts have embraced the model litigant obligation and recognized its value, whilst also maintaining a pragmatic approach which ensures that the State's operation is not unduly restricted. The state's right to vigorously defend claims is maintained as Whitlam J commented in *Brandon v Commonwealth*:⁴⁴

While the Commonwealth is no doubt a behemoth of sorts, it is not obliged to fight with one hand behind its back in proceedings. It has the same rights as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant.⁴⁵

In *State of Queensland v Allen*, Fryberg J noted that whilst the State is a model litigant 'it is entitled to act not only fairly, but also firmly',⁴⁶ holding that the State could still make claims of legal professional privilege, where required.

This was reinforced in *Canal Aviv Pty Ltd v Roads and Maritime Services*,⁴⁷ which concerned a dispute over land that was to be compulsorily acquired by the New South Wales government. Canal Aviv argued that the Roads and Maritime Services proposed submissions contradicted their position taken in an earlier case, and that this breached para 3.2 of the New South Wales Model Litigant Policy, which requires a model litigant to 'act consistently in the handling of claims and litigation'.⁴⁸ The Court dismissed these arguments, with Moore J finding that the Model Litigant Policy did not constrain the way in which the Roads and Maritime Services could run their case.

A further example of this is *Wodrow v Commonwealth of Australia*,⁴⁹ where Stone J held that the Commonwealth was not restricted in enforcing cost orders by the model litigant obligation. Stone J stated that the obligation 'does not impinge the Commonwealth's ability to enforce its substantive rights'. These cases illustrate the fact that the adoption of a model litigant obligation need not be viewed as an undue inhibition of state action, but rather as a tool to reduce state involvement in litigation in the first place, and to improve state conduct in litigation.

The model litigant obligation was invoked in *Challoner v Minister for Immigration & Multicultural Affairs (No 2)*,⁵⁰ where on the day prior to a hearing concerning the cancellation of a visa, (which the Commonwealth had requested be to be listed at an earlier date), the Commonwealth sought an adjournment on the basis that their counsel was unavailable. Drummond J was critical of this conduct, he alluded to the model litigant obligation, and described the behaviour of the Commonwealth as regrettable. He concluded that 'the extent to which that becomes regrettable is enhanced because it is the Commonwealth which has left itself open to this criticism'.

⁴⁴ [2005] FCA 109.

⁴⁵ *ibid*, [11].

⁴⁶ [2012] 2 Qd R 148, 170.

⁴⁷ [2018] NSWLEC 52.

⁴⁸ New South Wales Model Litigant Policy (n 26).

⁴⁹ [2003] FCA 403.

⁵⁰ [2000] FCA 1601.

In *Australian Competition and Consumer Commission v King Island Meatworks & Cellars Pty Ltd*,⁵¹ the Court held that the model litigant obligation required state litigants to show a readiness to settle in appropriate cases.

The Courts have been willing to apply the model litigant obligation expansively. For example, in *SZLPO v Minister for Immigration and Citizenship [No 2]*,⁵² it was held that the obligation included bringing the Court's attention to the arguments of the opposite parties, where the Court had seemingly overlooked them. The obligation subsisted even after a judgment had been delivered. In that case, the solicitor for the respondent Minister wrote to the court to inform it that in reaching its decision it had overlooked a ground relied on by the applicant. In its judgement the court had found in favour of the minister and had rejected SZLPO's application.⁵³ Upon being notified of the overlooked ground, the court reviewed its judgement and ultimately held in favour of the applicant and ordered that the decision of the Refugee Review Tribunal be set aside. In doing so the Court noted that by the solicitor's actions 'her client, through her, acted as a model litigant. The Court records its gratitude for her assistance'.⁵⁴ This case demonstrates the power of the model litigant obligation to significantly alter the behavior of the State in their conduct of litigation.

A similarly expansive approach was taken in *Wong Tai Shing v Minister for Immigration, Multicultural and Indigenous Affairs*.⁵⁵ In that case, the Minister filed an application for leave to appeal, the day before the written reasons of a decision were published. While such conduct did not directly breach the model litigant guidelines, Wilcox J stated, 'I would have expected any litigant, let alone a Commonwealth Minister, to pay the Court the courtesy of considering a judge's reasons for decision before deciding to contend the judge was wrong'.

In *LVR (WA) Pty Ltd v Administrative Appeals Tribunal*,⁵⁶ the Court noted that:

being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. The obligation may require more than merely acting honestly and in accordance with the law and court rules.⁵⁷

That approach is reflected in the latest version of the code, where 'the state is enjoined from relying on technical defences unless the Commonwealth's or agency's interests would be prejudiced by the failure to comply with a particular requirement'⁵⁸ and is further 'enjoined from requiring a party to prove a matter that the state or state agency knows to be true'.

⁵¹ [2013] 99 IPR 548, 563 [83].

⁵² [2009] 177 FCR 29.

⁵³ *SZLPO v Minister for Immigration and Citizenship* [2009] FCAFC 51.

⁵⁴ [2009] FCAFC 60 [4].

⁵⁵ [2002] FCA 1271.

⁵⁶ [2012] FCAFC 90.

⁵⁷ [2012] FCAFC 90 [42].

⁵⁸ Section 1(g), Appendix B.

The potential for the obligation to have a significant practical impact was evident in *ACCC v Australia and New Zealand Banking Group Ltd (No. 2)*,⁵⁹ where the Australian Competition and Consumer Commission was ordered by the Federal Court to pay 80% of the defendant's costs, because of its failure to comply with its model litigant obligations, in failing to issue a notice to answer interrogatories within the time limit ordered by the Court.

Taxation Context

The model litigant obligation has appeared frequently in the taxation context, as the Australian Taxation Office must comply with the model litigant obligations. The extent to which the Australian Courts are willing to uphold this obligation was evident in *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2)*, where Logan J refused to grant an order for costs requested by the Commissioner of Taxation, as a result of finding that the model litigant obligation standards were not met. Logan J held:

I do not propose to award professional costs to the Deputy Commissioner. Indeed, so to do would be to reward work which is not of a standard to be expected of a person asserted to be solicitor on the record for a person to whom model litigant obligations adhere.⁶⁰

This approach was echoed in *Phillips v Commissioner of Taxation*, where the Australian Tax Office were ordered by the Court to pay the applicant's costs, after seeking three extensions of time to file an affidavit. Lander J held that 'the ATO is a well-resourced agency of the Crown and a model litigant which is obliged to comply with any directions made by this Court'.⁶¹ This statement acknowledges a key justification underpinning the model litigant obligation; namely the State has a greater wealth of resources at its disposal compared to private individuals.

Enforcement

As mentioned above, the model litigant obligation is a matter of policy which does not create private rights and are not justiciable at the suit of an aggrieved litigant. This was confirmed in *Caporale v Deputy Commissioner of Taxation* where the Federal Court stated that 'no private rights are conferred by Appendix B 'The Commonwealth's obligation to act as a model litigant'.⁶² 'Ensuring compliance with the obligation is primarily the responsibility of the Commonwealth agency which has responsibility for the litigation' as mentioned in the Legal Services Direction 2017.⁶³ An Australian commentator has noted, that in order for the obligation to work effectively in practice, private litigants ought to be aware of the obligations imposed on government litigants, so that they can request the Court to enforce the higher standards expected of them.⁶⁴ There is a move to strengthen and enhance the model litigant obligation in Australia. As mentioned earlier, the Judiciary Amendment (Commonwealth Model Litigant) Bill 2017 provides a mechanism, that could strengthen enforcement of the model litigant obligation. It

⁵⁹ [2010] FCA 567.

⁶⁰ [2010] FCA 1224.

⁶¹ [2011] FCA 532 [8].

⁶² [2013] FCA 427 [39].

⁶³ Legal Services Directions 2017 (n 26) Note 1, Section 2, Appendix B.

⁶⁴ See for discussion; Eugene Wheelahan, 'Model Litigant Obligations: What Are They and How Are They Enforced?' (Federal Court Ethics Seminar Series, March 2016) <<https://www.fedcourt.gov.au/digital-law-library/seminars/ethics-seminar-series/20160315-eugene-wheelahan>> accessed 5th February 2020.

proposes allowing the Commonwealth Ombudsman to investigate complaints of breaches or infringements of the model litigant obligation.

While statistics concerning the operation of the model litigant obligation in Australia are difficult to find, there is some evidence of compliance. In the Australian Taxation Office Submission, 'Inquiry into Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017', in February 2018, the Australian Taxation Office noted that in 2016 -2017, 14 reported breaches of the model litigant obligations by the Australian Taxation Office were investigated, with a finding of only two breaches.⁶⁵

Political Will

A change of policy would of course require political action. There is evidence to suggest that our legislators might find such policy change attractive. Speaking in the Joint Committee on Economic Regulatory Affairs debate, in January 2010, Deputy Leo Varadkar remarked, in this context, 'is that not strange? For example, the Commission on Aviation Regulation might sue the Dublin Aviation Authority or something like that. It is effectively one arm of Government suing another part of Government?'⁶⁶ Similarly, in 2015, speaking in the Select Sub-Committee on the Department of The Taoiseach Debate, Minister of State at the Department of the Taoiseach, Deputy Sean Fleming asked:

Are there many cases where one State agency is suing another? I am not expecting to get that information now but I ask the Minister of State to provide a report on that as soon as possible. We often hear of cases where a local authority is being sued by the Inland Fisheries Board, for example. State agencies often have competing briefs. If we want to do something on a river, for example, the Inland Fisheries Board might have one view on it, while the Environmental Protection Agency, EPA, or local authority might have a different view. Sometimes, in such cases, State agencies end up facing each other in court at the taxpayer's expense. If the Minister of State does not have information on that question now, I ask that he send a note to the committee. That is the sort of thing that drives taxpayers bonkers, when the taxpayer is being caught for the costs on both sides.⁶⁷

In addition to congesting the Court system, state litigation generates enormous legal costs. Speaking in the Select Sub-Committee on the Department of The Taoiseach Debate in 2015, Minister of State at the Department of the Taoiseach, Deputy Paul Kehoe noted that it had not been possible for the Office of the Chief State Solicitor to stay within its allocated 9.6 million euro for expenditure on fees for counsel in 2015. In response to this information, Deputy Sean Fleming stated, 'I often feel that if State agencies were a bit more upfront earlier in the process, cases would be settled more quickly. A lot of people who take cases would be happy to settle earlier with an acknowledgment that something went wrong'.

⁶⁵ Australian Taxation Office Submission 'Inquiry into Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017', February 2018.

⁶⁶ Select Sub-Committee on the Department of the Taoiseach Deb 02 December 2015.

⁶⁷ *ibid.*

These interactions suggest that there is an appetite among legislators for a policy change which at once could significantly ease the congestion in our court system and save the taxpayer significant costs.

Conclusion

The role and responsibility of the State in litigation should be reassessed. Policy changes of the type suggested in this paper would save the state enormous sums in costs and would at the same time alleviate the unsustainable pressure facing the court system. Instances of State agencies suing each other and the State should be tackled by providing alternative dispute resolution mechanisms for intra-state disputes. The Australian model litigant obligation offers a promising mechanism by which the participation of the State in litigation can be reduced and improved. By holding State litigants to higher standards, the model litigant obligation would improve the conduct of the State in litigation and would serve as recognition of the fact that the State is the ultimate guarantor of its citizens' rights, and its conduct in litigation ought to reflect this.