Govt models only bad behaviour, unlike in 1912

By Bill Rowlings, CEO of Civil Liberties Australia

Don't hold your breath for the Commonwealth being made accountable for monitoring and enforcing its obligation to act as a model litigant, as the High Court of Australia held was mandatory back in 1912.

That's right, 1912.

The Senate committee system has become so unworkable that a simple inquiry – that it was given six months to complete – is set to take 13 months, with no firm commitment it will even meet its new and latest deadline. In September 2018 it promised a report by 7 December* 2018.

At issue is enforcing active compliance and/or introducing appeal remedies for the model litigant principles and obligations that the government is supposed to abide by in dealing with individual citizens and small businesses. They are meant to ensure a fair go for people in dispute with the massive machinery of the Commonwealth of Australia.

A way of achieving these outcomes was to introduce a private member's bill to parliament. That happened in November 2017, with a bill by NSW Senator David Leyonhjelm.

Effectively, we continue to be without a way of enforcing the right to a fair go that the High Court said we had 106 years ago. In the 1912 case of *Melbourne Steamship Co Ltd v Morehead,* Australia's first Chief Justice, Sir Samuel Griffith, described the obligation of the Crown (or Commonwealth) in litigation as:

> "[T]he old-fashioned, traditional and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary."

This 106-year-old standard – or even years more than that, if Griffith CJ is to be believed – applies because of the Crown's position as "the source and fountain of justice".

But the Commonwealth government does nothing active to ensure that it actually plays by the rules. It refuses to conduct annual surveys of whether its departments and agencies are doing the right thing legally. It takes virtually no enforcement action should a breach inadvertently come to its attention.

Photo: Leyonhjelm at left, Griffith at right.

No active 'policing'

The Attorney-General's Department (AGD) is responsible for adherence by all parts of government to the model litigant obligation (MLO). The MLO is a set of mandated principles – that is, they are part of the law of the land – under Appendix B of the Legal Services Directions 2017, which themselves stem from the Judiciary Act 1903. The principles include:

> 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. (Note 2)
>
> The obligation to act as a model litigant may require 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. (Note 3).

But, without active 'policing' of these legally-mandated responsibilities by the AGD, government departments and agencies can find wiggle room around their legal responsibilities, and they do, CLA believes.

With the deepest of pockets (that is, unlimited taxpayer funds), they can put poor people battling Centrelink or Veterans Affairs through a continuing legal nightmare, and even tie in knots of medical distress the government's own public servants battling against sometimes incomprehensible Comcare rulings.

Similarly, agencies like the Australian Tax Office can screw over small businesses, effectively shutting them down because the businesses run out of the will to keep fighting the government behemoth, as well as the time to fight (because small business has to work for its income), and the money to fund the fight.

The AGD has for years studiously avoided any investigative or survey work to check whether departments and agencies are abiding by the formal rules. Instead, AGD requires only that the departments and agencies "self report" if/when they have broken the rules.

The AGD self-reporting requirement is about as powerful and meaningful as asking the Australian banks to report when they have screwed over a customer: cover-ups are overwhelmingly more likely than confessions.

Liberal Democrat Senator David Leyonhjelm is aiming to force the government to do its already-legislated duty. He wants people and businesses to have the ability to take a complaint about how the government has treated them to the Commonwealth Ombudsman. The Ombudsmen could investigate and begin a process by which departments and agencies were forced to give people a fairer go than now.

In November 2017, Senator Leyohjelm introduced the *Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill.* He is trying to make parliament enforce clear and simple recommendations that the Productivity Commission made in September 2014, four years ago. The Productivity Commission recommended that:

- government, their agencies and legal representatives should be subject to model litigant obligations (if fact, CLA says, they already are – see the 1912 legal case, and others since); and
- compliance with these obligations should be **monitored and enforced**, including by establishing formal avenues of complaint to government ombudsmen for parties who consider that model litigant obligations have not been met.

It's the monitoring and enforcing of compliance that's missing. That's a clear responsibility of the Attorney-General, currently 'Christian' Porter. Like other AGs before him, he doesn't fulfil his role as First Law Officer of the Australia as CLA believes he should: he is far more dedicated to the law rather than justice, which is what the average punter seeks.

The Leyonhjelm bill was referred to the Senate Legal and Constitutional Affairs Committee in November 2017 for an inquiry and report. Civil Liberties Australia, and many other people and organisations, gave evidence before the committee earlier in 2018.

The never-never report?

The committee was given until 8 May 2018 to report to the Senate on the inquiry. Then that was extended to 26 June 2018, then that was extended to 27 July 2018, then that was extended to 19 September 2018…and now that has been extended to 7 December 2018.

This is a classic case of "Justice delayed is justice denied", CLA's President, Dr Kristine Klugman said.

"Not only will the parliament, the executive, the Attorney-General and his department and a parliamentary committee not do the right thing, it appears they are all actively colluding to delay – or avoid – even presenting a report to parliament.

"The Productivity Commission has already held an inquiry, and reported…four years ago.

"The only thing that can be delaying the Senate committee is that the government has to find a 'saleable' answer to its years of irresponsibility, under Liberal and Labor governments, before it can cobble together a report to the Senate which must address the government's unconscionable failure to do its duty for the latter part of the past 100 years," she said.

NOTE: 7 December 2018 – the date the report is finally due – is not a parliamentary sitting date, which means the report may not be lodged this year, if at all. It may well be that the government hopes to abandon this year-long inquiry entirely.

If the last parliament sitting day for 2018 remains as planned on 6 December, and a new federal election is called in early February for March 2019, the Leyonhjelm Model Litigant Bill could lapse without the report being presented to parliament…and we'll get no closer to making the government abide by its legislated duty to the people of Australia.