Appendix 1

Model Litigant Policy for Civil Litigation

1. Introduction

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

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

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

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

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

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

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

2. The obligation

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

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

3. Nature of the obligation

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

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

a) dealing with claims promptly and not causing unnecessary delay in the handling of claim1;, and litigation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) enforcing costs orders or seeking to recover costs;

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

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

d) seeking security for costs;

e) opposing unreasonable or oppressive claims or processes;

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

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

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

Appendix Z

NSW Government Guiding Principles for Government Agencies Responding To Civil Claims for Child Abuse

Introduction

These principles will promote cultural change across NSW Government agencies. The Guiding Principles apply to all NSW Government agencies that deal with civil claims involving child abuse.

The Guiding Principles are binding but are to be applied flexibly according to the circumstances of the case. They do not prevent NSW Government agencies from protecting the proper and legitimate interests of the State, which include legitimate steps to defend claims, including where a claim is vexatious, unmeritorious or an abuse of process.

The Guiding Principles apply to current and future claims from the date the principles are published, but should not apply to any claim that has been judicially determined or settled by the State.

The 19 Guiding Principles will make litigation a less traumatic experience for victims and ensure a compassionate and consistent approach across NSW Government when dealing with civil claims for child abuse.

Child abuse includes the sexual abuse and/or serious physical abuse of a child or young person (under 18 years of age) and any other abuse that is connected to the sexual or serious physical abuse.[1]

These principles apply to current and future claims.

The principles are as follows:

1. Agencies should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered child abuse.
2. Agencies will regularly make training available to lawyers who deal with child abuse matters. This training will address, for example, the effects of child abuse and the use of a trauma-informed framework when working on matters involving adult survivors of child abuse.
3. Agencies will consider resolving matters without a formal Statement of Claim.
4. Agencies will consider any requests from victims for alternative forms of acknowledgment or redress, in addition to monetary claims (for example, this could include requests for site visits).
5. Agencies should provide early acknowledgement of claims, including:
    - information about initial steps needed to resolve the claim (such as the estimated time for any necessary historical investigations by agencies) and where possible, potential timing (noting that for litigated matters timing will be governed by the court timetable); and
    - information about services and supports available to claimants.
6. Agencies will communicate regularly with claimants (or their legal representatives) about the progress of their claim.

[1] See definition of 'child abuse' in section 6A of the *Limitation Act 1969.*

7. Agencies will facilitate access to free counselling for victims.

8. Agencies should facilitate access to records relating to the claimant and the alleged abuse to the claimant, subject to others' privacy and legal professional privilege.

9. In accordance with the Model Litigant Policy, agencies should consider paying legitimate claims without litigation. Agencies should consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.

10. Agencies may not rely on a statutory limitation period as a defence. On 17 March 2016, the *Limitation Act 1969* (NSW) was amended to provide that an action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person may be brought at any time and is not subject to any limitation period under the Act.

    Principle 10 does not affect any other applications that a defendant may make at common law (for example, an application that a court strike out or stay proceedings that are an abuse of process).

11. Agencies will resolve all claims as quickly as possible, and will seek to resolve the majority of claims within two years, or for matters proceeding to hearing, to have the matter set down for hearing within two years. Progress may depend on the conduct of claimants' lawyers and police investigations.

12. To reduce trauma to victims and to reduce unnecessary cost and delay, agencies will suggest to claimants a range of potential experts, being both acceptable to agencies and providing genuine choice to claimants, to facilitate agreement on the use of a single expert where practicable.

13. Agencies will, in accordance with the Model Litigant Policy, act consistently in the handling of claims and litigation. In particular, agencies will consider verdicts and settlements in other cases involving similar harm to victims of child sexual assault, both within and across agencies. Agencies will also take account of the individual circumstances of each case.

14. Agencies should consider the use of confidentiality clauses in relation to settlements on a case by case basis, taking into consideration:

    - The claimant's preference.

    - Whether there is a cross claim or other related proceedings.

    In the event that a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim and their experience of the claims process.

15. Agencies should pursue alleged child abusers for a contribution to any settlement amount where this is practical and where a perpetrator is clearly culpable.

16. In accordance with the Model Litigant Policy, agencies should offer an apology in all cases where they are aware the State has acted improperly.

17. Agencies acknowledge they are required to report claims of any serious indictable offence to the NSW Police Force.

18. Compliance with this policy and the Model Litigant Policy will be overseen through annual reports to the Secretaries' Board or Social Policy Cabinet Committee (subject to the need to protect privacy and legal professional privilege) outlining:

    - The progress of civil matters involving child abuse
    - Explanations for any significant delay in resolving matters
    - Statements of compliance with Model Litigant Policy and these Principles

19. Agencies will provide assistance, where possible, to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

Revised m odel litigant policy

The Northern Territory Government has a common law responsibility to act as a model litigant. To ensure proper standards in litigation, the Northern Territory of Australia, its agencies, employees, and all lawyers acting for the Northern Territory must behave as a model litigant in handling claims and conducting litigation.

The obligation requires the Northern Territory to:

1. Act honestly, consistently and fairly when handling claims and litigation brought by or against the Northern Territory.
2. Act with complete propriety and in accordance with the highest professional standard, as recognised and expected by the courts.
3. Deal with claims promptly, avoid unnecessary delay and comply with all court orders and directions in a timely manner.
4. Make an early assessment of:
   a. the Northern Territory's prospects of success in legal proceedings; and
   b. the Northern Territory's potential liability in claims against the Northern Territory.
5. Pay 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.
6. Consider seeking to avoid or limit the scope of legal proceedings by taking such steps as are reasonable, including participating in appropriate alternative dispute resolution (ADR) processes or settlement negotiations in good faith.
7. Where it is not possible to avoid litigation, seek to keep the costs of litigation to a minimum, including:
   a. not requiring the other party to prove a matter which the Northern Territory knows to be true;
   b. not contesting liability if the Northern Territory believes that the main dispute is about quantum;
   c. taking steps that are reasonable to resolve those matters which may be resolved by agreement and to clarify and narrow those which remain in dispute; and
   d. monitoring the progress of the litigation and where appropriate, attempting to resolve the litigation.
8. Not rely on technical arguments unless the Northern Territory's interests would be prejudiced by a failure to comply with a particular requirement.
9. Not take advantage of a claimant who lacks the resources to litigate a legitimate claim.
10. Provide assistance to a claimant or their legal representative in identifying a proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.
11. Only pursue appeals appropriately where the Northern Territory believes it has reasonable prospects of success, or the appeal is otherwise in the public interest.
12. Apologise where the Northern Territory is aware that it or its representatives have acted wrongfully or improperly.

Explanatory notes:

1. The obligation does not prevent the Northern Territory from acting firmly and properly to protect its interests. The Northern Territory should appropriately test claims, and claim privilege or public interest immunity where applicable.
2. The Northern Territory may rely on the Limitation Act where it is appropriate to do so. For claims alleging child abuse within the meaning of the Limitation Act, see Complementary Guiding Principles.
3. The obligation does not prevent the Northern Territory from seeking security for costs where appropriate.
4. The Northern Territory, where appropriate to do so, should oppose oppressive subpoenas and oppressive requests for disclosure, apply to strike out untenable claims, seek costs, and pursue the recovery of costs.

Appendix 4

NORTHERN TERRITORY GOVERNMENT GUIDING PRINCIPLES FOR RESPONDING TO CIVIL CLAIMS ALLEGING CHILD ABUSE

The Northern Territory Government acknowledges the vulnerable status of victims and survivors of child abuse in our society. The Northern Territory recognises that the legal process of claims and civil litigation may be a traumatic experience, particularly for victims and survivors of child abuse.

These principles are intended to promote cultural change across all Northern Territory Government Agencies. The principles will apply to all Northern Territory Agencies that deal with civil claims involving child abuse and are intended to inform the responses of those Agencies to civil claims alleging child abuse. The principles will apply to current and future claims.

The principles are as follows:

1. Agencies should be mindful of the potential for litigation to be a traumatic experience for claimants who are victims and survivors of child abuse.

2. Agencies should not ordinarily rely on a claimant's delay or the passage of time as a reason as to why a proceeding should be stayed (noting that no limitation period applies under section SA of the *Limitation Ac .*

3. Agencies should consider the use of confidentiality clauses in relation to settlements on a case-by-case basis, taking into consideration the claimant's preference and whether there is a cross-claim or other related proceeding. In the event that a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim and their experience of the claims process.

4. Agencies should ordinarily pursue obtaining a contribution to any settlement amount from alleged abusers.

5. Agencies should consider arranging an early settlement and should generally be willing to enter into negotiations to achieve a settlement.

6. Agencies should develop pastoral letters that acknowledge claims and provide information about local support services to claimants.

7. Where appropriate, Agencies should offer a written apology to victims and survivors of child abuse. It will usually be appropriate for the apology to be signed by a senior executive officer within the Agency, however the appropriate signatory should be considered on a case-by-case basis.

Appendix 5

MODEL LITIGANT PRINCIPLES

(revised as at 4 October 2010)

These principles have been issued at the direction of Cabinet. The power of the State is to be used for the public good and in the public interest, and not as a means of oppression, even in litigation. However, the community also expects the State to properly use taxpayers' money and, in particular, not to spend it without due cause and due process. This means that demands on the State for compensation for injury or damages should be carefully scrutinised to ensure that they are justified.

The principles will be kept under review and amended from time to time with the approval of the Premier and the Attorney-General or, if significant amendments to the principles are proposed, with the approval of Cabinet.

It should also be noted that the principles are not intended to be applied rigidly and do not override any legislative requirement or authority concerning an agency's functions.

1. **The State and all agencies must conduct themselves as model litigants in the conduct of all litigation by adhering to the following principles of fairness:**
   - acting consistently in the handling of claims and litigation
   - dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
   - endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
   - where it is not possible to avoid litigation, keeping the costs of litigation to a minimum
   - paying legitimate claims without litigation, including making partial settlements of claims, or interim payments, where liability has been established and it is clear that the State's liability is at least as much as the amount to be paid
   - not seeking to take advantage of an impecunious opponent
   - not contesting matters which it accepts as correct, in particular by:
     - not requiring a party to prove a matter which the State knows to be true
     - not relying on purely technical defences where the State will suffer no prejudice by not doing so
     - not contesting liability if the State knows that the dispute is really about quantum
   - not instituting and pursuing appeals unless the State believes that it has reasonable prospects for success, or the appeal is otherwise justified in the public interest.

2. **The State must behave as a model litigant in the conduct of all litigation, including significant litigation, by adhering to the following principles of firmness:**
   - appropriately testing all claims
   - contesting all spurious or vexatious claims
   - claiming legal professional privilege where appropriate
   - claiming public interest immunity to protect confidential information such as Cabinet papers in appropriate cases
   - seeking security for costs where appropriate and pursuing costs when it is successful in litigation, which will assist in deterring vexatious proceedings from being instituted against it
   - not seeking to take advantage of an impecunious opponent
   - relying on available statutes of limitation, which have been enacted to protect a defendant from unfair prejudice
   - acting properly to protect the State's interests.

3. Alternative dispute resolution

- The State is only to start court proceedings if it has considered other methods of dispute resolution (for example, alternative dispute resolution or settlement negotiations).
- When participating in alternative dispute resolution, the State must ensure that its representatives:
  (a) participate fully and effectively, and
  (b) have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.

Appendix 6

Whole-of-Government Guidelines for responding to civil litigation involving child sexual abuse

Queensland Government

Purpose

1. These guidelines set out how the State of Queensland and all agencies should respond to civil litigation against the State brought by claimants who have been sexually abused as children and are intended to ensure a compassionate and consistent approach by government and to make civil litigation less traumatic for victims.

Background

2. The State and its agencies act as model litigants under the Model Litigant Principles, but the Model Litigant Principles do not address how the State and its agencies will handle civil litigation in relation to child sexual abuse claims. These guidelines have been developed in response to **recommendations 96 - 99**[1] of the Royal Commission into Institutional Responses to Child Sexual Abuse - Redress and Civil Litigation Report 2015.

Minimise potential re-traumatisation of claimants

3. The State and all agencies should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.

4. The State and all agencies must conduct themselves as model litigants in the conduct of the litigation. The State and all agencies must be consistent in responding to claimants in similar circumstances in civil litigation involving child sexual abuse claims. The State and all agencies must communicate regularly with claimants (or their legal representatives) about the progress of their claim.

5. The State and all agencies should consider any requests from claimants for alternative forms of acknowledgement or redress, in addition to monetary claims (e.g. site visits).

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96 [1] Government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.

97 The guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessarily adversarial responses to claims.

98 The guidelines should include an obligation on the institution to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

99 Government and non-government institutions should publish the guidelines they adopt or otherwise make them available to claimants and their legal representatives.

6. Agencies should provide regular training to lawyers who deal with child sexual abuse matters. This training could include the effects of child sexual assault and the use of a trauma-informed framework when working on matters involving adult survivors of child sexual assault.

Easing legal processes

7. The State and all agencies should consider resolving matters without a formal statement of claim.

8. Intentionally deleted.

9. The State and all agencies should ordinarily not rely on a release or discharge from liability under: a deed of release pursuant to or in connection with the Redress scheme in response to the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde inquiry). However, the terms of such a deed may be taken into account in any litigation or settlement negotiations. For example, adjudicated or negotiated damages may take account of any payment under such a deed.

10. The State and all agencies should consider paying legitimate claims without litigation. The State and all agencies should consider facilitating early settlements and should be willing to enter into negotiations to achieve early settlements.

11. The State and all agencies should consider the use of confidentiality clauses in relation to settlements on a case by case basis, taking into consideration the claimant's preference and whether there is a cross claim or other related proceedings. In the event a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim and their experience of the claims process.

12. The State and all agencies should develop guidance material, including pro forma letters that acknowledge claims, information about the initial steps needed to resolve the claim (such as the estimated time for any necessary historical investigations by agencies), information about the potential timing for resolving matters and information about services and support available to claimants.

13. To reduce trauma to victims and to reduce unnecessary cost and delay, agencies will suggest a range of potential experts (providing genuine choice) to claimants to facilitate agreement on the use of a single expert where practicable.

14. The State and all agencies should offer an apology where the State has acted improperly. Ordinarily it will be appropriate for the apology to be delivered by a senior executive officer, however this will depend on the circumstances.

15. These guidelines do not bind the State and they must be applied flexibly and depending on the circumstances of each claim. These guidelines and the Model Litigant Principles do not prevent the State and all agencies from acting to protect the proper and legitimate interests of the State. They do not therefore preclude all legitimate steps being taken to defend claims which are vexatious or unmeritorious or prevent the State from applying to the Court for a stay of proceedings if the lapse of time has a burdensome effect on the State that is so serious that a fair trial is not possible.

16. The State and all agencies will provide assistance whenever possible to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

17. The Guidelines will be reviewed and amended from time to time with the approval of the Premier and the Attorney-General, or if significant amendments to the Guidelines are proposed, with the approval of Cabinet.

June 2018 v2

Appendix 7

Victorian Government Solicitor's Office

Client Newsletter

Revised Model Litigant Guidelines for the State of Victoria

March 2011

Introduction

The Attorney General, the Honourable Robert Clark MP, has recently approved revised Model Litigant Guidelines for use by the State of Victoria, its departments, agencies and office holders in all litigation claims in all courts in Australia.

Although the Commonwealth's Model Litigant Guidelines which were introduced in 1997 were revised in 2005 and 2008, this is the first time Victoria's Model Litigant Guidelines, which were introduced in 2001, have been revised.

New Obligations

In a nutshell, the revised guidelines impose five new express obligations upon the State of Victoria:

1. Deal with claims promptly and not cause unnecessary delay.
2. Make an early assessment of the State's prospects of success or potential liability in claims.
3. Consider Appropriate Dispute Resolution (ADR).
4. When participating in ADR, participate fully and effectively.
5. Consider apologising where the State or agency is aware of wrongful or improper conduct.

Summary

Victoria's Model Litigant Guidelines have been recently revised and impose new dbligations upon the State in its litigation claims.

Departments and Agencies need to be aware of these new obligations and their application to claims and litigation involving the State.

Keeping costs to a minimum

In addition, the obligation of a model litigant to keep litigation costs to a minimum has been strengthened by requiring the State to take any reasonable steps to narrow the issues in dispute and, where appropriate, attempt to resolve the litigation.

Technical arguments

The previous uncertainty about whether and in what circumstances the State could rely upon technical defences, and in particular what a 'technical' defence meant has been removed by replacing 'technical defences' with 'technical arguments'. The State cannot now rely on technical arguments unless its interests would be prejudiced by the failure to comply with a particular requirement.

Relationship with Civil Procedure Act

The revised Model Litigant Guidelines also make it clear that they are to be read in conjunction with the provisions of the *Civil Procedure Act 2010,* in particular the paramount duty and overarching obligations imposed by Chapter 2 of that Act. The relationship between the Act and the guidelines is therefore complementary, and ·Government parties in litigation can and should comply with their obligations under both the Act and the guidelines.

The full text of the revised guidelines (with changes highlighted in green) is as follows:

Guidelines on the State of Victoria's obligation to act as a model litigant

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.

2. The obligation requires that the State of Victoria, its Departments and agencies:

a) act fairly in handling claims and litigation brought by or against the State or an agency;

b) act consistently in the handling of claims and litigation;

c) deal with claims promptly and not cause unnecessary delay;

d) make an early assessment of:

i. the State's prospects of success in legal proceedings; and

ii. the State's potential liability in claims against the State;

e) pay 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 paid;**

£) consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve the dispute by agreement, including participating in appropriate dispute resolution (ADR) processes or settlement negotiations;

g) where it is not possible to avoid litigation, keep the costs of **litigation to a minimum, including by:**

i. **not requiring the other party to prove a matter which the State or the agency knows** to be **true;**

11. **not contesting liability** if **the State or the agency** believes **that the** main **dispute is about quantum;**

iii. taking such steps, if any, as are reasonable to resolve such matters as may be resolved by agreement and to clarify and narrow the remaining issues in dispute; and

iv. monitoring the progress of the litigation and, where appropriate, attempting to resolve the litigation, including by settlement offers, offers of compromise and ADR;

h) when participating in ADR or settlement negotiations, ensure that as far as practicable the representatives of the State or the agency:

i. have authority to settle the matter so as to facilitate appropriate and timely resolution; and

ii. participate fully and effectively.

i) do not rely on technical arguments unless the State's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;

j) do not take advantage of a claimant who lacks the resources to litigate a legitimate claim;

k) do not undertake and pursue appeals unless the State or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest; and

l) consider apologising where the State or the agency is aware that it or its representatives have acted wrongfully or improperly.

Notes

1. The State of Victoria acknowledges the assistance of the Commonwealth in developing these Guidelines. The Guidelines are based on the Directions on the Commonwealth's Obligation to Act as a Model Litigant, which were issued by the Commonwealth Attorney General pursuant to s 55ZF of the *Judiciary Act 1903.*

2. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other ADR processes) involving State Departments and agencies, as well as Ministers and officers where the State provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Victorian Government Solicitor, in-house or private, will need to act in accordance with the obligation to assist their client agency to do so.

3. Appropriate Dispute Resolution (ADR) means a process including but not limited to mediation, early neutral evaluation, judicial resolution conference, settlement conference, reference of a question to a special referee, expert determination, conciliation, and arbitration.

4. Where State of Victoria Departments and agencies are involved in disputes with other State of Victoria Departments and agencies, they are expected also to adhere to the 'Guidelines for the conduct of disputes between different public sector bodies within the State of Victoria', approved by Cabinet on 11 February 2008.

5. In essence, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead(1912)* 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong fun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

6. 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.

7. The obligation does not prevent the State and its 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 State and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.

8. The obligation does not prevent the State from enforcing costs orders or seeking to recover costs.

9. The obligation should be observed in conjunction with the provisions of the Civil Procedure Act 2010 and, in particular, the paramount duty and overarching obligations imposed by Chapter 2 of the Act.

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Appendix B

Department of Health and Human Services and Department of Education and Training

Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse

1. The Department of Health and Human Services (DHHS) and the Department of Education and Training (DET) acknowledge the vulnerable status of children in our society. The departments recognise that the process of civil litigation may be a traumatic experience, especially for victims/survivors of child sexual abuse.

2. DHHS and DET have developed common non-binding and guiding principles (Common Guiding Principles) to inform their responses to civil claims involving allegations of child sexual abuse in connection with State institutions (civil child sexual abuse claims).

3. The Common Guiding Principles are:

    a. Departments should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abus .

    b. Departments should not ordinarily rely on a claimant's delay or the effluxion of time as a reason why a proceeding should be stayed (noting that no limitation period applies - see note 4 below).

    c. Departments should ordinarily not require confidentiality clauses in the terms of settlement.

    d. Departments should ordinarily pursue a contribution to any settlement amount from alleged abusers.

    e. Departments should consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.

    f. Departments should develop pastoral letters that acknowledge claims and provide information about services and supports available to claimants.

    g. Departments should offer a written apology in all cases where they consider it is appropriate. Ordinarily it will be appropriate for the apology to be signed by a senior executive officer, however this will depend on the circumstances.

NOTES

4. The *Limitation of Actions Amendment (Child Abuse) Act 2015,* removed the limitation period in relation to claims for damages arising from child sexual abuse, with the consequence that such claims are no longer statute barred by reason of the length of time between the abuse occurring and a claim being made. However, the removal of the limitation period does not limit a court's power, in an appropriate case, to stay a proceeding where the effluxion of time or other circumstances means that a fair trial is not possible.

5. The Common Guiding Principles are designed to ensure that DHHS and DET respond appropriately to civil child sexual abuse claims in a manner that:

    a. minimises potential further trauma to victims/survivors;

    b. is not unnecessarily adversarial;

    c. is consistent between claimants in similar circumstances; and

    d. responds to the different circumstances of different claims brought against the State.

6. In order to maintain proper standards in litigation, the State of Victoria and its departments and agencies follow the Model Litigant Guidelines. The Common Guiding Principles are intended to complement the Model Litigant Guidelines as they apply in the specific context of responding to civil child sexual abuse claims.

7. The Common Guiding Principles do not bind the State of Victoria and they must be applied flexibly and depending on the circumstances of each particular claim. Accordingly, the State may sometimes act outside the general principles set out above.

8. The Common Guiding Principles, along with the Model Litigant Guidelines, do not prevent the State and its departments and agencies from acting to protect the proper and legitimate interests of the State. They do not therefore preclude all legitimate steps being taken to defend claims, including where a claimis vexatious or unmeritorious.

9. The Common Guiding Principles apply to DHHS and DET, but may be adopted by other Victorian Government departments and agencies. The Common Guiding Principles apply to litigation (including before courts, tribunals, inquiries and in arbitration and other appropriate dispute resolution processes such as mediation, expert determination and conciliation), as well as when responding to any non-litigated claims for compensation. Ensuring that the Common Guiding Principles are considered when responding to civil child sexual abuse claims is primarily the responsibility of the department which has the responsibility for the claim. In addition, lawyers engaged in responding to civil child sexual abuse claims, whether the Victorian Government Solicitor, in-house or private, should be provided with the Common Guiding Principles for consideration when assisting their client department.

Appendix 9

WESTERN AUSTRALIA GOVERNMENT WHOLE OF GOVERNMENT GUIDING PRINCIPLES FOR RESPONDING TO CIVIL LITIGATION INVOLVING CHILD SEXUAL ABUSE

PURPOSE

The State of Western Australia is required to act as a model litigant in all legal proceedings. However model litigant requirements do not specifically identify how the State and its agencies will handle civil litigation involving allegations of child sexual abuse. These guidelines are intended to do just that, so that the State and people involved in litigation against the State which involves allegations of child sexual abuse, are aware of the way in which the State and all of its agencies should respond to such litigation.

They intend to ensure a consistent and compassionate approach is taken by government. The guidelines have been developed in response to Recommendations 96- 99 of the Royal Commission into Institutional Responses to Child Sexual Abuse - Redress and Civil Litigation Report 2015.

MINIMISING POTENTIAL FOR RE-TRAUMATISATION OF VICTIMS AND EASING THE LEGAL PROCESS

The State and its agencies should at all stages of the litigation process be mindful that litigation can be a traumatic experience for persons who have suffered sexual abuse as children. In an effort to reduce that trauma and ease the burden of litigation the State and its agencies should:

1. provide regular training to lawyers and other officers who deal with victims of child sexual abuse so that they understand the effect of such abuse on victims;
2. be consistent in its responses to claims;
3. make available to claimants and potential claimants information about initial steps which need to be taken both by the Plaintiff and the State/agency to resolve a claim. This may include information about the claimant, the institution at which the alleged abuse occurred and the time that may be required by the State to undertake document searches needed in order to respond to the allegation(s);
4. communicate regularly with claimants and their legal representatives about the status of and progress of their claims;
5. consider whether a matter can be resolved without proceedings being issued;
6. make available to the Plaintiff access to records relating to the claimant and the alleged abuse, subject to others' privacy, legal professional privilege and any legal restrictions on the provision of such access to the Plaintiff;
7. assist claimants and their legal representatives to identify the proper defendant(s) if they have not already been identified;
8. consider paying claims without litigation and engage in settlement negotiations as early as reasonably possible in the process in circumstances

where the State considers it is arguable it bears some liability at law for the abuse;

9. where expert reports are required, nominate several relevant experts to whom it would agree to the claimant being referred so that, where possible, an agreement can be reached with the plaintiff as to the use of a single expert;

10. consider any requests for alternative forms of acknowledgement or redress that may be requested by a victim in the course of the litigation process.

11. offer to make a written or verbal apology by a sufficiently senior appropriate officer where the State has acted improperly.

12. consider the use of confidentiality clauses in relation to settlements on a case by case basis having regard to the wishes of the claimant and whether there is a cross claim or related claim. A confidentiality clause should not restrict the claimant from discussing the circumstances of their claim and their experience of the claim process.

ENSURING OTHER RESPONSIBLE PARTIES ARE HELD ACCOUNTABLE

In order to ensure that other responsible parties are held accountable for child sexual abuse, the State and its agencies will:

1. report claims of any serious indictable offence to the WA Police Force.

2. pursue alleged abusers for a contribution to any settlement amount where this is practical and where a perpetrator is clearly culpable.

3. join to any proceedings or involve in any settlement discussions any other entity, including the Commonwealth or any non-Government institution, which it considers bears liability for the child sexual abuse.

GUIDING PRINCIPLES ARE NOT BINDING ON THE STATE

These Guiding Principles do not bind the State or its agencies and must be applied flexibly depending on the circumstances of each claim. They do not prevent the State from acting to protect the proper and legitimate interests of the State. The State will defend claims where it does not consider it bears any liability at law for the abuse. Where matters are not capable of informal settlement, claimants will still have to prove their claims in court in the ordinary way to the civil standard, that is on the balance of probabilities.

These Guiding Principles also do not prevent the State from acting to defend claims which it regards as being vexatious, unmeritorious or where it believes that the circumstances are such that it would be impossible for the defendant to obtain a fair trial (eg. because of the passage of time, loss of documents, death of witnesses etc.) and which a court may stay as an abuse of process.

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