

LEGAL PRACTITIONERS — MODEL LITIGANT GUIDELINES

Hon GIZ WATSON to the parliamentary secretary representing the Attorney General:

I refer to the model litigant guidelines issued by the federal government pursuant to section 55ZF of the Judiciary Act 1903, and the New South Wales government's model litigant policy for civil litigation.

- (1) When will the Attorney General issue model litigant guidelines for legal practitioners acting for the state and its agencies?
- (2) In the absence of model litigant guidelines in Western Australia, what mechanism, if any, currently prevents the state and its agencies involved in litigation from —
 - (a) failing to disclose relevant parliamentary or government information that may not be otherwise available to the court or tribunal or the other side; for example, the policies and materials upon which a decision under judicial review is based, or statutory regulatory provisions that are intended to be introduced or repealed or a motion that is about to be debated; and
 - (b) engaging in the behaviours prescribed by the federal and New South Wales model guidelines, including —
 - (i) taking advantage of a litigant who lacks the resources to litigate a legitimate claim; and
 - (ii) relying on technical defences even if the state's or agency's interest would be prejudiced otherwise?

Hon MICHAEL MISCHIN replied:

I thank the honourable member for some notice of this question. The Attorney General advises the following —

- (1) The government has no plans to issue model litigant guidelines for legal practitioners.
- (2) Model litigant guidelines are unnecessary in this jurisdiction. Judicial pronouncements throughout Australia dating back to at least 1912 have identified a clear and unambiguous duty upon the state to act fairly and honourably in the conduct of litigation. Such strong and authoritative pronouncements by courts must necessarily hold greater weight than mere guidelines adopted by a government to advise or instruct government lawyers. Moreover, the proposal to create model litigant guidelines incorrectly presumes that the obligations on advocates acting for government bodies differ significantly from those obligations incumbent upon all barristers and solicitors conducting litigation. Such obligations include, but are not limited to: the duty not to use the court's process for reasons other than to win litigation; the duty to disclose to the court important relevant facts known to them; the duty not to mislead the court, and particularly to inform the court of any relevant authority or legislation that is directly in point yet adverse to their client's case; the duty to only plead arguments that have an appreciable prospect of success so as not to waste time and money; the more general duty not to waste time and money; the duty to act honestly and fairly; the duty not to take advantage of an opponent's purely technical errors; and, the duty to avoid delay. The convergence between general barristers' duties and model litigants' duties has been further supported by judicial statements.