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Office

# The Model Litigant Policy

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2 March 2020



Overview:  
(i) The Policy  
(ii) Why It Matters

# The Policy

# Model Litigant Policy

(Premier's Memorandum M2016-03 Model Litigant Policy for Civil Litigation)

## The purpose

- The “maintenance of proper standards in litigation.... founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation.”

## The obligation

- The State and its agencies must act as a model litigant in the conduct of civil litigation.
- The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules.
- To be a model litigant, the State must act with complete propriety, fairly and in accordance with the highest professional standards.

# Being a Model Litigant

## **What does 'propriety and fairness' look like in practice?**

- DCJ will not cause unnecessary delay in litigation
- DCJ will consider all available options before proceeding with litigation
- Where it is not possible to avoid litigation, the costs of litigation will be kept to a minimum
- DCJ will not take advantage of a party who lacks the resources to be properly represented
- DCJ will not undertake and/or pursue appeals unless there are reasonable prospects for success or the appeal is otherwise justified in the public interest.

# Being a Model Litigant

## What does 'propriety and fairness' look like in practice?

- DCJ will keep the objects (s. 8) and principles (s. 9) of the Care Act front of mind in all actions taken under the Act
- DCJ will ensure that all steps comply with the overriding duty to safeguard the safety, welfare and wellbeing of children as the paramount consideration: s. 9
- DCJ will be "frank and honest" with the Court at all times  
(Law Society, *A Guide to Ethical Issues for Government Lawyers*)
- DCJ will be held to the highest standards of "diligence and integrity"  
(President Johnstone, *Best practice in the conduct of care proceedings in the Children's Court*)

# Being a Model Litigant

## ***Code of Conduct for Legal Representatives in Care and Protection Proceedings in the Children's Court (Court Advisory Committee):***

- Expeditious resolution, utilising ADR where appropriate
- Promote spirit of non-adversarial proceedings, with minimal formality and technicality

And specifically, DCJ lawyers must:

- Represent DCJ “in a way that protects and promotes DCJ’s credibility”
- Represent DCJ “consistent... with its role to provide assistance to children, young people and families in the least intrusive way possible”
- Provide full and frank disclosure of all relevant material “in a complete, fair and impartial manner, whether that material supports DCJ’s case”

# Being a Model Litigant

## ***Practice Note 5: Case Management in Care Proceedings***

- The overriding objective is “dealing with cases justly” including:
  - Ensuring that in all decisions made, the child’s safety welfare and well-being are paramount
  - Dealing with cases expeditiously, and fairly
  - Dealing with cases in a manner proportionate to the nature, importance and complexity of the issues
  - Ensuring all parties are on an equal footing



# Being a Model Litigant

## ***Permanency Case Management Policy: Rules and Practice Guidance (2019)***

- Describes the “minimum expectations of DCJ and FSPs in working collaboratively to deliver the Permanency Support Program”
- FSPs are expected to “support the department in Children’s Court proceedings by.... ***sharing all relevant information including in response to the department’s requests for information to enable timely assessment, filing of all relevant evidence in proceedings, and progress of the court proceedings***”
- FSPs are expected to “support the department in Children’s Court proceedings by:
  - providing evidence, including affidavits or reports, and other information on the child, their family and kin, and their placement

# Being a Model Litigant

- arranging for affidavit/report authors to be available to give evidence
- arranging access to the child by their separate legal representative
- carefully managing communication between the child, their carers, parents and family/kin, and referring parties to their legal reps as appropriate
- implementing decisions regarding drug and alcohol or DNA testing of parents
- contributing to developing a care plan with the department
- complying with court orders, including preparation of draft section 76 or 82 reports by the due dates and
- organising contact, respite or other action in accordance with court orders”
- FSPs are expected to “make reasonable efforts to provide the information to the department within five (5) business days of a request, or contact the department and negotiate a different time frame.”

# Being a Model Litigant

## **The model litigant policy does not prevent:**

- DCJ from “acting firmly and properly to protect its interests” (ie children and young people)
- DCJ from “testing or defending claims”
- DCJ from requiring parties to comply with directions and procedural requirements

Why does it matter?

# A cautionary tale: the importance of upholding standards of the model litigant

## **Reported case law on the model litigant in care proceedings:**

- 1) *The Secretary, Department of Family and Community Services and Tyson Tanner (Costs)* [2017] NSWChC 1
- 2) *B v Secretary, Department of Family and Community Services (No 2)* [2018] NSWDC 174
- 3) *Re A Foster Carer v DFACS (No 2)* [2018] NSWDC 71
- 4) *Department of Family and Community Services (DFaCS) and the Mason Children (Costs)* [2018] NSWChC 3

(nb s. 88 Care Act – costs – ‘exceptional circumstances’)

## ***The Secretary, Department of Family and Community Services and Tyson Tanner (Costs) [2017] NSWChC 1***

- Facts: Tyson (born 2007), placed with maternal grandparents aged 7 months, care orders made June 2008. Carer reviews all positive.
- Father files s90 application Sept 2015. Secretary decides to support the application and increase father's contact, citing concerns about grandparents' relationship with each other and with DCJ, and use of physical discipline.
- Maternal grandparents file a cross-application Oct 2015. Secretary introduces week-about 'contact' with father Jan 2016.
- Clinic report March 2016 supports grandparents. Tyson's wishes (report obtained by ILR) are to stay with grandparents.
- Children's Court determines in Nov 2016 to allocate PR to grandparents to age 18.
- The grandparents, unsurprisingly, made a costs application.

## ***The Secretary, Department of Family and Community Services and Tyson Tanner (Costs) [2017] NSWChC 1***

Held, ordering costs against the Department, *inter alia*:

- “The Secretary’s position had no merit. This is not a case that could have gone either way.”
- The Secretary’s Care Plan was “false and/or misleading” in many respects. There was no cogent evidence to support many of the “concerns” set out the in Care Plan.
- “The Secretary had an entrenched and immoveable view and unreasonably rejected the powerful expert evidence without any expert evidence in contradiction.”

## ***The Secretary, Department of Family and Community Services and Tyson Tanner (Costs) [2017] NSWChC 1***

- “As a model litigant the Secretary clearly has responsibility to ensure that all relevant evidence is presented to the Court even if it does not assist his case. This responsibility is even more essential in a case where the proceedings are meant to be non-adversarial and the outcome sought is an order that is in the best interest of a child.”
- It would be “inimical to this responsibility” in a Care Plan to:
  - include false and misleading information or allegations
  - omit positive reports
  - fail to be even handed
- “The information contained in and omitted from Tyson’s Care Plan was deliberate in the sense that it was included to bolster the Secretary’s case. The result however was that the Care Plan was misleading and in breach of the Secretary’s responsibility as a model litigant.”



## ***B v Secretary, Department of Family and Community Services (No 2) [2018] NSWDC 174***

### Facts:

- Section 90 proceedings relating to “B”, culminating in the Children’s Court allocating PR to the father.
- Mother brings District Court appeal against this decision.
- The District Court, in granting the mother’s appeal, found that “FaCS, a presumed model litigant, obtained what has been demonstrated in this appeal, to be a materially flawed report from a Children’s Court Clinician”.

## ***B v Secretary, Department of Family and Community Services (No 2) [2018] NSWDC 174***

- Finding that the proceedings in the Children’s Court had ‘miscarried’ for a number of reasons including:
  - Children’s Court Clinic report was deficient due to deficiencies in the briefing materials provided by the caseworker to the Clinic, due to the omission of relevant documents which the Department knew existed
  - FACS opposing the admission of relevant evidence tendered by the mother
- “[F]ull disclosure of relevant factual information is what is expected and required of a model litigant”

*(note successful complex appeal, but not disturbing this principle)*

## ***Re A Foster Carer v DFACS (No 2)* [2018] NSWDC 71**

### Facts:

- Proceedings concerned a child placed with foster carer since birth. Six years later, following allegations against her, the NGO with case management responsibility conducted an investigation and removed the child.
- Judge Levy, allowing her appeal, found that the investigation report was “flawed, unfair and unjust” (including failing to consider potentially exculpatory evidence) (*Re A Foster Carer v FACS* [2017] NSWDC 360)
- The carer, unsurprisingly, made a costs application.
- Judge Levy ordered FACS to pay the carer a lump sum \$23,000 costs.

# ***Department of Family and Community Services (DFaCS) and the Mason Children (Costs) [2018] NSWChC 3***

## **Facts:**

- Proceedings concerned two children aged 4 and 6. Mother making serious allegations of sexual abuse of children by the father and his brother. The Secretary accepted those allegations, and initiated care proceedings, seeking sole PR to the mother. A Clinic report supported the Secretary's views. After the close of evidence at the final hearing, the Secretary accepted there was insufficient evidence to consider the father to pose a risk of sexual harm to the children, and proposed shared PR between the parents with unsupervised time to father.
- The Court determined that the mother had fabricated the allegations, and ordered a fresh care plan for NRPR to mother, and RPR to father.
- The father, unsurprisingly, made a costs application.

## ***Department of Family and Community Services (DFaCS) and the Mason Children (Costs) [2018] NSWChC 3***

Held, ordering costs against the Department:

- “The Secretary formed the view by [2016] that [the child] had been subjected to sexual abuse”, and subsequent investigations were conducted through that “filter”
- “The Secretary failed to obtain potentially exculpatory evidence”, and “did not make adequate inquiries of third parties, nor did he critically examine information from collateral sources”
- “The Secretary’s care plans were replete with significant factual errors”

## ***Department of Family and Community Services (DFaCS) and the Mason Children (Costs) [2018] NSWChC 3***

- “The Secretary’s assessments that the father posed an unacceptable risk to the children and the mother posed no risk were based on a flawed, inadequate and one-sided assessment that did not withstand reasoned scrutiny. The Secretary’s assessments were neither thorough nor fair. The gravity of the issues to be assessed required an unbiased approach, a collection of material from a number of sources and a far more rigorous and comprehensive analysis of the evidence.”
- Whilst the Clinic report supported the Secretary’s position, alternative views might have been explored by the Clinician had she been given the correct information and not misleading documents.
- “A proper assessment of the evidence ought to have demonstrated the unreliability of the conclusions reached by the Secretary and it is this that demonstrates the existence of exceptional circumstances that supports the need for compensatory costs.”

# Common themes

A lack of:

- Full and frank disclosure
- Diligence
- Impartiality

can fundamentally undermine the Court's confidence in the evidence presented.

# In a nutshell...



The key is to:

- Work collaboratively, responsively and proactively with Departmental colleagues
- Share all relevant information and documents in a timely manner
- Ensure that the Court has all relevant information before it, in order that all decisions are made consistent with the child's safety, welfare and well-being at the forefront.





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