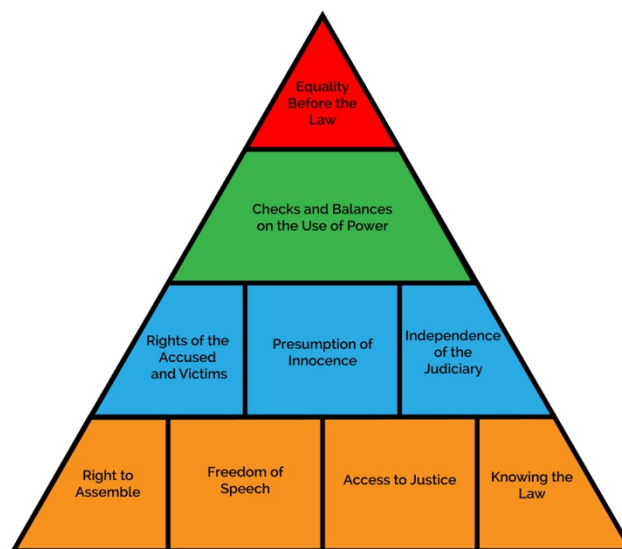


# Rule of Law, Human Rights & Access to Justice: Resolving Disputes with the Government

## What is the Rule of Law?

The Rule of Law is the idea that we have laws which are followed and that people are subject to the law regardless of their status in society.

The pyramid summarises rule of law principles that exist as ideals in Australian society and support the rule of law.



## How is the government kept accountable when it is in a legal dispute with an individual or a private organisation?

Commonwealth agencies and departments have the **Legal Services Directions 2005 (Cth)** which contain the **Model Litigant Obligations**.

NSW and other states and territories have similar obligations, but none allow for them to be enforced by a court. There are internal processes for sanctioning government agencies who breach them. These sanctions are rarely, if ever, used. Reporting of breaches is far from ideal, and there is criticism from academics that breaches are under reported.

These obligations are very important because signifies that a Government agency is a special party in a legal proceeding because it has all the power and resources of the Government behind it. Government agencies can be over-zealous or overbearing in dealing with individuals in court.

It is important to recognize that there is a balance to be struck. Not in favour of the individual at the expense of the government, but in recognition of the fact it is not always appropriate for the Government to attempt to win at all costs!

## Compensation for the Residents of the Bethcar Children's Home

In 1978, Bethcar was described in the NSW Legislative Assembly as a "special aboriginal service", and in 1980 NSW Youth and Community Service Minister Rex Jackson awarded Bert and Edith Gordon Childcare Parents of the Year.

In the 1970s, Bethcar was operated by the Gordons, and their son-in-law, Colin Gibson. Gibson was gaoled in 2007 for two sexual assaults of children in the home. Mr Gordon was not prosecuted due to ill health and died in 2006.

In the trial of Gibson and subsequently in testimony given to the **Royal Commission into Institutional Responses to Child Sexual Abuse**, it was established that many acts of physical and sexual abuse occurred at the home.

Between 2008 and 2013 - 15 former residents of Bethcar ("the residents") brought civil proceedings against the NSW government, specifically the Department of Family and Community Services (FACS). They argued that:

- 1) FACS was liable for not acting on reports of abuse
- 2) FACS was vicariously liable for the actions of Mr Gordon and Gibson

The **Child Abuse Royal Commission** announced a case study into the Bethcar Children's Home in September 2013.

One resident said in her testimony:

"I remember that when I went to court for the **time limitation**, the other side didn't have their stuff ready...I was thinking that they had all these years to prepare and they **still weren't ready**"

Michael Coutts-Trotter, the Secretary of the Department of Family and Community Services (FACS) in NSW at the time of the Royal Commission, said in his statement that:

"I think ... we drifted into a **defensive strategy** and an **adversarial strategy** without carefully thinking through the fundamental issue, ... we had a liability, we had a responsibility to respond far more effectively and far more quickly than we did... we fell into a set of **narrow technical decisions** that then just seemed to follow their own course over a five-year period."

After 5.5 years of litigation, each resident received \$107 000 in an out of court settlement and costs were awarded against the NSW Government of \$930 000 in addition to their own legal costs of \$1.24 million.

### **Law Reform: NSW Government Response**

The response from the NSW Government to the Bethcar litigation was in the form of guiding principles:

"1. Agencies should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse. ...

6. Agencies will communicate regularly with claimants (or their legal representatives) about the progress of their claim.

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

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. State agencies should not generally rely on a statutory limitation period as a defence; ...

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.” For the full guiding principles see: <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/guiding-principles-civil-claims-child-sexual-abuse.aspx>

### **Access to Justice and the Model Litigant Rules**

The obligation the Government has to act as a model litigant is one that is taken seriously by Government Departments and Agencies. However, it is all too easy for these guidelines to be forgotten, or put to the side when there is little by way of sanctions or oversight.

If a Government is overbearing in dealing with individuals and uses its power in a way that unfairly disadvantages individuals this is an issue with equality before the law and access to justice.

A level playing field for the Government and the individual is ideal – Government should not be disadvantaged in holding individuals to account, but there needs to be greater attention to ensuring individuals are not treated unfairly because of an imbalance of power.

### **Should judges be able to enforce compliance with model litigant principles?**

### **Should model litigant principles apply to non-government parties when there is an imbalance of power?**

This is currently an area of law that is obscure and only well known to lawyers and public service employees, and some litigants who deal with these issues.

With ever increasing regulation by governments – these principles will become more important in the future in ensuring that individuals receive just outcomes in legal proceedings.



## Further Reading

### A Dispute with Centrelink

Gabrielle Appleby, 'The Government as Model Litigant', *UNSW Law Review*, Vol 37(1), [http://www.unswlawjournal.unsw.edu.au/sites/default/files/appleby\\_371.pdf](http://www.unswlawjournal.unsw.edu.au/sites/default/files/appleby_371.pdf)

See p.116-117 for a case study on Mr Nichols whose dispute with Centrelink where he made an anti-discrimination complaint. Weinberg J criticized the conduct of the Government in running an expensive and complex litigation spending large amounts of tax payers money when the matter could be resolved through mediation.

### The Bethcar Children's Litigation

Nonee Walsh, 'Bethcar Children's Home: Resident broke own arm to escape sexual abuse, royal commission told', *ABC News Online*, 22-10-2015. <http://www.abc.net.au/news/2014-10-22/bethcar-resident-broke-her-own-arm-to-escape-sexual-abuse/5832486>

Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 19, October 2014, Sydney. <http://www.childabuseroyalcommission.gov.au/case-study/a83cd4b4-1c68-4233-953c-a7da8e3cfa8b/case-study-19,-october-2014,-sydney>

*The Opening Address found on the page above from Counsel Assisting the Commission is the most accessible summary of the proceedings.*

