

Public Service and Other Legislation (Civil Liability) Amendment Bill 2013

Explanatory Notes

Short title

The short title of the Bill is the Public Service and Other Legislation (Civil Liability) Amendment Bill 2013.

Policy objectives and the reasons for them

The objective of the Bill is to support State and Queensland Police Service (QPS) employees to perform their roles, to make decisions independently, and to innovate and improve service delivery without the concern of being sued and the accompanying financial risk, by providing an enhanced protection from civil liability.

Achievement of policy objectives

The Bill will achieve its objective of providing greater certainty for State employees by amending the *Public Service Act 2008* by inserting new provisions providing:

1. protection from civil liability for State employees for engaging in, or as a result of engaging in, conduct in an official capacity
2. preservation of the rights of potential claimants by transferring civil liability of State employees to the State
3. for the State to have a right to recover financial contributions from State employees who have engaged in conduct other than in good faith, and with gross negligence.

The Bill will achieve its objective of providing certainty regarding liability for police officers and other members of the QPS by amending the *Police Service Administration Act 1990*:

1. by amending existing provisions to provide officers, recruits, staff members and volunteers with immunity from civil liability for engaging in, or as a result of engaging in, conduct in an official capacity
2. by preserving of the rights of potential claimants by transferring civil liability of QPS employees to the State
3. by amending the recovery provision such that the State may recover a contribution from an officer, recruit or staff member only where they have engaged in conduct other than in good faith, and with gross negligence.

Alternative ways of achieving policy objectives

Passage of legislation is required to achieve the policy objectives.

At present, there is a mix of policy and legislation providing various levels of indemnity / immunity for public officials. The number and complexity of the existing systems contributes to the administrative burden and despite the protections currently in place, State and QPS employees continue to be sued for carrying out their official duties. The proposed legislative amendments will provide greater certainty for these employees that the State will afford them legal protections for the discharge of their official duties.

Estimated cost for government implementation

The implementation of proposed legislation is estimated to be at NIL cost to government. Existing indemnity schemes already operate within Queensland. The establishment of a legislated system of immunity for public officials (including an amendment to the existing legislated system for police officers), provides certainty of terms and conditions for such protection but is not anticipated to increase costs.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. It does confer immunity from a proceeding but there is adequate justification for this immunity (s4(3)(h) of the *Legislative Standards Act 1992*).

The Bill provides for an immunity from civil liability for State and QPS employees. This is considered justified because the State, as an employer, should ensure that an employee is not be exposed to liability and the accompanying financial risk, for carrying out his or her duties. This risk has the potential to stifle innovation and inhibit changes in practices leading to improvements in service delivery in the public sector. A clear statement that State and QPS employees will be supported will lay a strong foundation for better engagement with risk in the public sector, leading to better service delivery outcomes for the people of Queensland.

The inclusion of a right of action for the State to recover a contribution from the employee, where the employee has engaged in conduct other than in good faith, and with gross negligence, ensures an appropriate balance is maintained in supporting employees but ensuring they remain accountable for their actions.

The immunity only relates to an employee – it does not extend to the State itself and it does not alter the position that the State may be vicariously liable for the actions of its employees. The amendments will apply equally and consistently across the public service.

Consultation

Consultation external to Government has not occurred in relation to this Bill, as it relates to the State's arrangements for providing legal assistance to its employees.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland and is not intended as complementary or uniform legislation.

A review of legislation indicates that South Australia is the only Australian jurisdiction that operates a broad legislative immunity for its public service. It is adopted under s74 of the *Public Sector Act 2009* (SA). Under this section, civil liability does not attach to a public sector employee for an act or omission in the exercise of official powers or functions. This means any action that would normally lie against a public sector employee lies instead against the Crown. The legislation does, however, provide for recovery action to be taken by the Crown against an employee if it is considered the employee has breached the standard of good faith.

Notes on provisions

Part 1

Clause 1 states that, when enacted, the Bill will be cited as the *Public Service and Other Legislation (Civil Liability) Amendment Act 2013*.

Clause 2 provides that the Act commences on a day to be fixed by proclamation.

Part 2

Clause 3 states that this part amends the *Public Service Act 2008* (PSA).

Clause 4 amends the long title of the PSA to reflect that the new provisions to be inserted by the Bill have coverage for public service employees and other persons involved in the public sector.

Clause 5 amends section 13 of the PSA. Section 13 provides that the PSA does not apply to particular offices and employment. The amendment to section 13 provides that it does not limit the application of the new provisions being inserted by this Bill in chapter 1, part 3, division 3 of the PSA.

Clause 6 inserts a divisional heading, after the chapter 1, part 3 heading in the PSA. The insertion of the heading supports a structure for the new provisions to be inserted by this Bill.

Clause 7 inserts a divisional heading, after section 25 of the PSA. The insertion of the heading supports a structure for the new provisions to be inserted by this Bill.

Clause 8 inserts a new division (chapter 1, part 3, division 3) after section 26 of the PSA. The new division comprises three (3) sections:

- A new section 26A, which provides that the main purpose of the division is to support the management and employment principles and the work performance and personal conduct principles (contained in sections 25 and 26 of the PSA).
- A new section 26B, which sets out the persons to whom chapter 1, part 3, division 3 applies, and collectively defines them as ‘State employees’.

State employee is defined to include public service employees employed under the PSA, as well as employees of entities that represent the State. This is intended to cover employees of entities such as Hospital and Health Services and Ambulance and Fire Services. For the purposes of the provision State employees can also include persons to whom powers or functions are delegated under an Act.

The section also specifies certain persons as excluded from the definition of ‘State employees’, including persons covered by s10.5 of *Police Service Administration Act 1990*, as they are proposed to be covered by immunity provisions to be included in that Act (as addressed below), appointees of the Governor alone and members or employees of Government Owned Corporations and their subsidiaries and Government Companies.

The section also provides that other persons can be prescribed via regulation as either being or not being State employees.

The section further provides that chapter 1, part 3, division 3 applies to persons who were State employees at the time they engaged in conduct in an official capacity, even if they have since ceased to be a State employee.

- A new section 26C provides that a State employee does not incur civil liability for engaging in, or as the result of engaging in, conduct in an official capacity, transferring this liability instead to the State (or if they are a member or employee of a body corporate, to that body corporate).

The section also provides that where a State employee is found to have engaged in conduct other than in good faith, and with gross negligence, the State can seek a contribution from the State employee. The amount of contribution is an amount found to be just and equitable by a court in the circumstances. This provision means that where a State employee fails to meet the standard of conduct expected of them, they could be financially liable, for example in relation to costs incurred in responding to a claim and/or orders made as a result of proceedings.

Definitions are included in this section:

- Civil liability is defined by reference to liability to pay amounts. This encompasses direct costs such as compensation or financial settlements, as well as liability because of an obligation to do something that involves payment an amount, such as rectifying damage to property.

The immunity will be broad enough to cover complaints to bodies like the Anti-Discrimination Commission of Queensland and the Health Quality Complaints Commission, and defamation proceedings.

It will not, however, preclude an employee being named in proceedings or prevent a court or tribunal making orders or issuing injunctions about specific conduct by employees, such as orders to cease contraventions of an Act.

Examples are included to aid interpretation.

- Conduct is defined to include both acts and omissions.
- Engaging in conduct in an official capacity is defined to mean conduct that is part of, or otherwise connected with a person's role as a State employee. This definition reflects that persons covered by this division perform a range of duties associated with their role, not just formal exercises of power or functions under an Act.
- The section also confirms the definition of State employee as set out in s26B(4).

Clause 9 omits the existing s88, which provides immunity for commission officials. Such persons will be covered by the immunity provisions introduced into chapter 1, part 3, division 3.

Clause 10 omits the existing s214A, which provides immunity for appeals officials. Appeals officials are staff members of the commission, or other persons, performing appeals functions under Chapter 7, Part 1 of the PSA. Such persons will be covered by the immunity provisions introduced into chapter 1, part 3, division 3.

Clause 11 inserts a new part 11 in chapter 9 of the PSA. The part includes three (3) sections.

- A new section 286 which provides definitions for the part, consistent with the provisions of the new chapter 1, part 3, division 3.
- A new section 287 which provides transitional arrangements for the new chapter 1, part 3, division 3 provisions.

Section 287 provides that that the new provisions will not apply to conduct occurring prior to the commencement of the chapter 1, part 3, division 3 provisions.

The exception to this is where conduct, which occurred prior to the commencement of the new provisions, forms part of a course of conduct with conduct that occurred or occurs after the commencement of the provisions. In such cases, the new provisions will apply to all conduct forming part of that course of conduct.

It also provides that where conduct occurred prior to commencement that would have enlivened sections 88 or 214A, those provisions (described as protection provisions) apply despite their repeal.

- A new section 288 deals with the relationship between the new chapter 1, part 3, division 3 provisions and provisions in other Acts that provide immunity for civil liability (however described).

The section provides that where a person would be civilly liable under an immunity provision in another Act, but would not be civilly liable under the chapter 1, part 3, division 3 provisions of the PSA, the PSA provisions will apply.

This section has the effect that where the PSA provision affords a person a higher level of protection than an alternative immunity provision, the PSA provision will prevail.

Part 3

Clause 12 states that this part amends the *Police Service Administration Act 1990* (PSAA).

Clause 13 replaces the existing sections 10.5 and 10.6 of the PSAA, with a new section 10.5.

The new section 10.5 provides that a police officer, staff member, recruit or QPS volunteer does not incur civil liability for engaging in, or as the result of engaging in, conduct in an official capacity, transferring this liability instead to the Crown.

The immunity is proposed to operate on the same terms as the immunity provision proposed for the PSA.

The section also provides that contribution (on terms equivalent to the PSA) can be recovered from officers, staff members and recruits (including persons formerly occupying these roles). The provision does not, however, allow for recovery against volunteers, reflecting the nature of their involvement with the police service and consistent with the current PSAA.

This section also contains the definitions relevant to the immunity provision, consistent with the PSA. A definition of volunteer, consistent with the current PSAA is also included.

Clause 14 inserts a new Division 6 (comprising three sections), providing transitional provisions as a result of this Bill.

- A new section 11.12 provides definitions for the part consistent with the new s10.5.
- A new section 11.13, which explains how the new section 10.5 of the PSAA will apply to conduct that occurred or occurs before or after the commencement of these provisions.

The clause operates such that conduct (including torts, acts or omissions) which occurred prior to the commencement of the new section 10.5, are to be managed in accordance with sections 10.5 and 10.6 as they were before being repealed by this Bill.

The exception to this is where conduct which occurred prior to the commencement of the new section 10.5, forms part of a course of conduct with conduct that occurred or occurs after the commencement of the new section 10.5. In such cases, the new provisions will apply to all conduct forming part of that course of conduct.

- A new section 11.14 which explains the relationship between the new section 10.5 and other civil liability provisions in the PSAA or other Acts.

The section provides that where an immunity provision exists in another Act or elsewhere in the PSAA and despite that provision, the person would be civilly liable, but they would not be liable under the new s10.5, the new s10.5 will apply.

This section has the effect that where the new section 10.5 provision affords a person a higher level of protection than an alternative immunity provision, the new section 10.5 provision will prevail.