



ANTI DISCRIMINATION
COMMISSION QUEENSLAND

8 January 2014

Mr Steve Davies MP
Chair
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Davies

INQUIRY INTO THE *PUBLIC SERVICE AND OTHER LEGISLATION (CIVIL LIABILITY) AMENDMENT BILL 2013*

Thank you for providing the Anti- Discrimination Commission (Commission) with the opportunity to comment on the *Public Service and Other Legislation (Civil Liability) Amendment Bill 2013* currently before the Parliament.

The functions of the Commission include dealing with complaints alleging unlawful discrimination, sexual harassment, victimisation and other contraventions of the *Anti-Discrimination Act 1991* (AD Act), as well as complaints alleging reprisal under the *Public Interest Disclosure Act 2010* (PID Act).

Complaint process

The Commission's complaint process is a pre-requisite step for anyone wishing to pursue a civil claim for unlawful discrimination, sexual harassment, victimisation and other contraventions of the AD Act. People who experience reprisal for making a disclosure under the PID Act have the option to pursue a civil claim in the courts or to utilise the Commission process.

Complaints that meet threshold jurisdiction are accepted into the Commission's complaint handling process. The role of the Commission in relation to accepted complaints is to seek resolution through conciliation. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.

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The effect of the Bill is to transfer the civil liability of public and police service employees to the State for engaging in, or as a result of engaging in, conduct in an official capacity, while providing a right for the State to recover financial contributions from those employees who have engaged in conduct other than in good faith and with gross negligence. Conduct is defined to include both acts and omissions, and engaging in conduct is defined to mean conduct that is part of, or otherwise connected with, the person's role as a State employee. As such, this transfer of liability has the potential to impact the complaint handling processes of both the Commission and the tribunal.

In the 2012 – 2013 reporting period, approximately 20% of complaints accepted by the Commission involved the State of Queensland. Whilst the majority of all accepted complaints arise in the work area,¹ other jurisdictional areas relevant to the State include education, the provision of goods and services, the administration of State laws and programs, and access to public places and buildings. The majority of complaints of reprisal under the PID Act involve the State. Complaints against the State are made by workers (including former workers) as well as by members of the public.

The State will be a respondent to complaints where it is alleged the State has primary liability (e.g. discrimination in a policy or requirement) and / or vicarious liability for the conduct of an employee or other agent (e.g. sexual harassment by an employee or agent). The majority of accepted complaints involving the State include individual public or police service employees as respondents.

The government's current prescribed procedure for State employees to obtain legal assistance or indemnity necessitates the departmental decision-maker obtaining advice from Crown Law.² The time taken to complete this process can interfere with the statutory expectation that the Commission conduct a conciliation conference within 6 weeks of notifying the acceptance of a complaint.³ Where a decision has not been made before the date set for the conciliation conference, the respondents will usually request the conference take place at a later time. Changes to scheduled dates and arrangements for conciliation conferences can often cause distress and lead to further polarisation of the parties.

Accordingly, the transfer of civil liability to the State as provided for in the Bill is likely to overcome this negative aspect, and aid timeliness in the Commission's complaint handling process.

¹ 65% - see table 11 Annual Report of the Anti-Discrimination Commission Queensland, page 25

² *Guideline for the Grant of Indemnities and Legal Assistance to State Employees* – summary and access on the Department of Premier and Cabinet
<http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard/liability-indemnity/indemnities.aspx>

³ *Anti-Discrimination Act 1991*, section 143

Vicarious liability & individuals as respondents

As stated in the Explanatory Notes to the Bill, the Bill would not alter the position that the State may be vicariously liable for the actions of its employees,⁴ and would not preclude an employee being named in proceedings or prevent a court or tribunal making orders or issuing injunctions about specific conduct by employees⁵.

Under the *Anti-Discrimination Act 1991*, employers and principals are jointly and severally liable for the any contravention of the Act in the course of work or while acting as agent.⁶ Likewise, under the *Public Interest Disclosure Act 2010*, public sector entities are jointly and severally civilly liable for reprisal by the entity's employees.⁷

In the Bill, 'civil liability' is defined by reference to liability to pay an amount of money, and the examples of types of liability set out in the clause include liability because of an agreement or order under the *Anti-Discrimination Act 1991*.⁸

The outcomes of conciliation of complaints at the Commission and the tribunal are not confined to the payment of money. They can include, for example, apology, statement of regret, individuals or organisations to do something or stop doing something, undertaking training, future behaviour, and review or implementation of policies and procedures. Likewise, the orders the tribunal can make if a complaint is proven are not confined to the payment of money. The orders the tribunal may make are set out in section 209 of the *Anti-Discrimination Act 1991*, an extract of which is attached.

For these reasons, the Bill is unlikely to change the practice of complainants pursuing their complaints against, and naming as respondents, individual public and police service employees. Nor will the transfer of liability render the vicarious liability provisions of the *Anti-Discrimination Act 1991* and the *Public Interest Disclosure Act 2010* nugatory.

Commission staff

Under the *Anti-Discrimination 1991*, the Commissioner and staff are protected from civil actions for an honest act or omission in the performance of functions and exercise of powers under the Act. Any such civil liability attaches instead to the State.⁹

⁴ Explanatory Notes, page 2

⁵ Explanatory Notes, page 5

⁶ *Anti-Discrimination Act 1991*, section 133

⁷ *Public Interest Disclosure Act 2010*, section 43

⁸ Clause 8, new section 26C(6)

⁹ *Anti-Discrimination Act 1991*, section 265

The Bill makes provision for the relationship between the new immunity provisions and immunity provisions in other Acts, such as the existing Commission protection.

The effect of the new section 288 of the *Public Service Act 2008* will be that Commission staff will have the benefit of the existing protection as well as any greater protection under the new immunity.

Conclusion

In conclusion, the Commission supports the objectives of the Bill and recommends the Bill be passed by the Parliament.

Yours sincerely



NEROLI HOLMES
Acting Anti-Discrimination Commissioner

Anti-Discrimination Act 1991

209 Orders the tribunal may make if complaint is proven

- (1) If the tribunal decides that the respondent contravened the Act, the tribunal may make 1 or more of the following orders –
 - (a) an order requiring the respondent not to commit a further contravention of the Act against the complainant or another person specified in the order;
 - (b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention;
 - (c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant and another person because of the contravention;
 - (d) an order requiring the respondent to make a private apology or retraction;
 - (e) an order requiring the respondent to make a public apology or retraction by publishing the apology or retraction in the way, and in the form, stated in the order;
 - (f) an order requiring the respondent to implement programs to eliminate unlawful discrimination;
 - (g) an order requiring a party to pay interest on an amount of compensation;
 - (h) an order declaring void all or part of an agreement made in connection with a contravention of this Act, either from the time the agreement was made or subsequently.
- (2) An order may be made under subsection (1)(b) in favour of a person on whose behalf a representative complaint was made, without the necessity for the person to make an individual complaint, if on the evidence before it the tribunal is able to assess the loss or damage of the person.
- (3) If, in respect of a representative complaint —
 - (a) the tribunal decides that the respondent contravened the Act; but
 - (b) the tribunal is unable, on the evidence before it at the hearing of the representative complaint, to assess the loss or damage of a person on whose behalf the complaint was made;the person may subsequently make a request for the tribunal to assess the person's loss or damage.
- (4) In this section, the specified things a respondent may be required to do, include, but are not limited to –
 - (a) employing, reinstating or re-employing a person; or
 - (b) promoting a person; or
 - (c) moving a person to a specified position within a specified time.
- (5) In this section –

damage, in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.